(23,160)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 1084.

HOME TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

CITY OF LOS ANGELES ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 27, 1912.

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a Supreme Court of the United States.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXANDER, Mayor of the City of Los Angeles; The Council of the City of Los Angeles and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Appellees.

Transcript of Record.

Upon Appeal from the District Court of the United States in and for the Southern District of California, Southern Division.

b In the District Court of the United States in and for the Southern District of California, Southern Division, January, 1912, Term.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant and Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXANDER, Mayor of the City of Los Angeles; The Council of the City of Los Angeles and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants and Appellees.

Citation.

UNITED STATES OF AMERICA, *ss.*:

The President of the United States to The City of Los Angeles, a municipal corporation; George Alexander, Mayor of said City of Los Angeles; The Council of the said City of Los Angeles and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie,

H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, members of and constituting the said Council of the said City of Los Angeles; The Board of Public Utilities of the said City of Los Angeles and Lewis R. Works, Martin
c Bekins, and Thomas Foulkes, members of and constituting the said Board of Public Utilities of the said City of Los Angeles, and Charles J. Sebastian, Chief of Police of the said City of Los Angeles, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States in the City of Washington, within sixty days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States, in and for the Southern District of California, Southern Division, In Equity, at the January 1912 term of said court, and filed in the Clerk's office of said court, on the 18th day of March, A. D. 1912, in a case wherein the Home Telephone & Telegraph Company, a corporation, is complainant and appellant, and you are defendants and appellees, to show cause, if any there be, why the decree rendered in the said cause, dismissing the amended bill of complaint of the said complainant and appellant, as in the appeal mentioned, should not be set aside and corrected, and why speedy justice should not be done to the complainant and appellant in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 18th day of March, A. D. 1912.

OLIN WELLBORN,
Judge of the District Court of the United States in and for the Southern District of California, Southern Division.

Service of a copy of the foregoing Citation is hereby admitted this 18th day of March, A. D. 1912.

JOHN W. SHENK,
City Attorney,
By GEO. E. CRYER,
Ass't City Attorney,
Attorneys for Appellees.

d [Endorsed:] Orig. No. 1685. U. S. District Court Ninth Circuit, Southern District of California. Home Telephone & Telegraph Company, a corporation, Complainant and Appellant, vs. City of Los Angeles, a municipal corp., et al., Defendants and Appellees. Citation. Filed Mar. 18, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams Deputy Clerk. Gibson, Dunn & Crutcher, Los Angeles, Cal., Att'ys for Complainant and Appellant.

e *Names and Addresses of Attorneys.*

For Appel-ant: Messrs. Gibson, Dunn & Crutcher, Pacific Electric Building, Los Angeles, California.

For Appellees: John W. Shenk, Esq., City Attorney, Los Angeles, California; Geo. E. Cryer, Esq., Assistant City Attorney, Los Angeles, California.

1 In the District Court of the United States in and for the Southern District of California, Southern Division.

No. 1685.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXANDER, Mayor of the City of Los Angeles; The Council of the City of Los Angeles and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants.

2 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

HOME TELPHONE & TELEGRAPH COMPANY, a Corporation, Complainant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation, et al., Defendants.

Stipulation.

In the above entitled cause, the defendants, M. S. Gregory, T. L. O'Brien, W. J. Washburn, and George H. Stewart, named in the original bill of complaint, having ceased to be members of the council of the City of Los Angeles, their terms of office having expired;

It is stipulated that F. C. Langdon, Chas. McKenzie, H. W. Reed and John Topham, who have been elected and have qualified as the successors of said defendants as members of said council, may be substituted as parties defendant in this cause, in the place and stead of said four defendants first herein named.

Dated Los Angeles, California, February 23rd, 1912.

GIBSON, DUNN AND CRUTCHER,
Solicitors for Complainant.
JOHN W. SHENK, *City Attorney;*
GEORGE E. CRYER,
Assistant City Attorney,
Solicitors for Defendants.

3 (Endorsed:) C. C. No. 1685. U. S. District Court, Southern District of California. Home Telephone & Telegraph Company, a corporatiton, Complainant, vs. City of Los Angeles, a Municipal Corporation et al., Defendants. Stipulation. Filed Feb. 23, 1912, Wm. M. Van Dyke, Clerk, By C. E. Scott, Deputy Clerk. Gibson, Dunn & Crutcher, Los Angeles, Cal., Atty's for Complainant.

4 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant,

vs.

CITY OF ANGELES, a Municipal Corporation; GEORGE ALEXANDER, Mayor of the City of Los Angeles; The Council of the City of Los Angeles and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilties of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants.

Amended Bill of Complaint.

To the Honorable Judges of the District Court of the United States in and for the Southern District of California, Southern Division:

The Home Telephone & Telegraph Company, a corporation, as hereinbefore stated, by leave of Court first had and obtained, files this, its Amended Bill of Complaint, against the City of Los Angeles, a Municipal corporation, George Alexander, Mayor of said City of Los Angeles, the Council of the City of Los Angeles,

5 and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk and F. J. Whiffen, members of and constituting said Council of the City of Los Angeles, and The Board of Public Utilties of the City of Los Angeles, Lewis R. Works, Martin Bekins and Thomas Foulkes, members of and constituting said Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, and *therefore* your orator, said complainant, complains and says:—

I.

That said complaint is, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California, and was at all of said

times, and is, engaged in the operation of telephone lines in the City of Los Angeles, in the State of California, and having its principal place of business in said city, in the County of Los Angeles, state aforesaid.

II.

That the City of Los Angeles, one of the defendants herein is, and at all of the times hereinafter mentioned was, a Municipal corporation, duly incorporated under the laws of the State of California, and situate in the County of Los Angeles, in the Southern Division of the Southern District of said State of California.

III.

That defendant, George Alexander, ever since the 7th day of January, 1910, has been and now is, the duly elected, qualified and acting Mayor of the said City of Los Angeles.

That defendants, M. F. Betkouski, J. A. Andrews, George Williams and Robert M. Lusk, ever since the month of January, 1910, and F. J. Whiffen, ever since the month of July, 1910,
6 and F. C. Langdon, Chas. McKenzie, H. W. Reed and John Topham, ever since the month of January, 1911, have been and now are the duly elected, qualified and acting Councilmen of the City of Los Angeles, and members of and constituting the Council of the said City of Los Angeles.

That said defendants, Lewis R. Works and Martin Bekins, on or about July 5th, 1911, and said defendant, Thomas Foulkes, on or about September 12, 1911, were duly appointed as, and ever since have been and now are, the duly qualified and acting members of, and constitute said Board of Public Utilities.

That the defendant, Charles J. Sebastian, is, and *at* at all times since on or about March 21, 1911, has been, the duly appointed, qualified and acting Chief of Police of the City of Los Angeles, and as such is the principal ministerial officer of said city, and charged with the duty of enforcing the penal provisions of all ordinances of said city, by arresting and imprisoning, according to law, any person violating the same.

IV.

That the complainant is, and was at all of the times herein mentioned, the owner and in possession of and operating all that certain system of telephonic communication, and all of the real and personal property used in connection therewith, situated in the said City of Los Angeles, and hereinafter particularly described.

That at all of the times hereinafter mentioned, complainant was the owner of a franchise for the operation and maintenance, for the term of fifty years from the 8th day of February, 1902, of a telephone system in the City of Los Angeles, and since said 8th day of February, 1902, has been and now is operating the telephone system above referred to, under and by virtue of said franchise, and will continue to operate thereunder for more than one year next after July 1st, 1911.

That said franchise is not an exclusive franchise, and that, at all said times, there has been in operation a competing telephone system in the said City of Los Angeles, owned or controlled by the Pacific Telephone & Telegraph Company, a corporation organized and existing under the laws of the State of California.

V.

That in and by the constitution of the state of California, it is provided that any city containing a population of more than 3500 inhabitants may frame a charter for its own government, which charter, after adoption by the electors of such city at an election held for that purpose, shall be submitted to the legislature of said state, for its approval or rejection as a whole, without power of alteration or amendment, which approval may be made by concurrent resolution, and if approved by a majority vote of the members elected to each house, it shall become the charter of such city, and shall become the organic law thereof, and supersede any existing charter, and all laws inconsistent with the charter so adopted and ratified; and also that a charter so ratified may be amended by amendments adopted by the electors of such city, and approved by the legislature, in the manner hereinbefore stated for the approval of a charter; and that in and by said constitution it is further provided that cities and towns in said state, and all charters thereof framed and adopted by authority of said constitution, except in municipal affairs, shall be subject to and controlled by general laws.

That under and pursuant to said constitution, the electors of said city of Los Angeles, said city then having a population exceeding the populatiton required by said constitution for that purpose, duly adopted a charter for said city, which said charter was duly approved by the legislature of said state, by concurrent reso-
8 lution, on the 31st day of January, 1889, which said charter and said resolution approving the same was published by authority of law as a part of the statutes and acts of said legislature at its session of the year 1889.

That amendments to said charter were duly adopted by the electors of said city, and on the 23rd day of January, 1903, duly approved by said legislature by concurrent resolution, and the same published by authority of law, as a part of the statutes and acts of said legislature at its session of the year 1903.

That further amendments to said charter were duly adopted by the electors of said city, and on the 16th day of February, 1905, duly approved by said legislature by concurrent resolution, and the same published by authority of law, as a part of the statutes and acts of said legislature at its session of the year 1905.

That further amendments to said charter were duly adopted by the electors of said city, and on the 19th day of February, 1907, duly approved by said legislature by concurrent resolution, and the same published by authority of law, as a part of the statutes and acts of said legislature at its session of the year 1907.

That further amendments to said charter were duly adopted by the electors of said city, and on the 12th day of March, 1909, duly

approved by said legislature by concurrent resolution, and the same published by authority of law, as a part of the statutes and acts of said legislature at its session of the year 1909.

That further amendments to said charter were duly adopted by the electors of said city, and on the 25th day of March, 1911, duly approved by said legislature by concurrent resolution, and the same published by authority of law, as a part of the statutes and acts of said legislature at its session of the year 1911.

9 To said charter of the City of Los Angeles, and said amendments thereof, and the said respective publication of said charter and said amendments, reference is here made, and said charter and said amendments thereof made a part hereof.

VI.

That in and by the provisions of said charter of said City of Los Angeles, as the same was amended on or about the 25th day of March, 1911, as aforesaid, and thereafter in force and effect, the State of California has delegated to the said City of Los Angeles the power to fix and determine the rates or compensation to be collected by any person, firm or corporation for telephones and telephone service and connections, and to prescribe the character and quality of any public utility service; and said charter further specifically provides that the Board of Public Utilities of said City shall have the power to fix, subject to approval, change or modification by the Council of said city, as therein and hereinafter stated, the rates to be charged and collected for the service furnished or supplied by all persons, firms or corporations, operating or maintaining telephone systems in said city, such rates to be fixed by resolution of said Board; and further provides that, after the publication of such resolution of the Board of Public Utilities, any person affected by such rates may file objections thereto, and thereupon the said Council of said city may order a rehearing of such rates, and after such rehearing, shall have power to finally fix such rates by approving, changing or modifying the same by ordinance, adopted by a two-thirds vote of said Council; and further provides that all rates, to which no objections are filed, or offered, shall be deemed to be finally fixed by said Board of Public Utilities.

10 VII.

That on or about the 13th day of June, 1911, pursuant to the aforesaid provisions of the charter of said city, the Board of Public Utilities of said city adopted a resolution purporting to fix the rates to be charged and collected by your complainant and its said competitor, for telephones, telephone service and telephone connections, in the City of Los Angeles during the year commencing July 1, 1911, and ending June 30, 1912, a copy of which said resolution is hereunto annexed, marked Exhibit A, and made a part hereof.

VIII.

That thereafter objection to the rates so fixed by said resolution of the Board of Public Utilities were duly filed and the said Council ordered a rehearing thereof, and after such rehearing, to-wit, on the 28th day of July, 1911, said Council, by a two-thirds vote thereof, passed an ordinance purporting to finally fix the rates to be charged and collected by this complainant for telephones, telephone service and telephone connections, in the City of Los Angeles during the year commencing July 1, 1911, and ending June 30, 1912, which said ordinance was approved by the Mayor of said city, on said date, and thereafter published as required by law, a copy of which said ordinance is hereunto annexed, marked Exhibit B and made a part hereof. That said ordinance has not been repealed or amended.

That the schedule of rates so purporting to be fixed by said ordinance of July 28, 1911, was much lower than the rates prescribed by said resolution of said Board of Public Utilities, and was wholly unreasonable, inadequate and confiscatory, as hereinafter more specifically alleged and shown.

IX.

That in and by said charter of the City of Los Angeles, it is further provided that it shall be the duty of said Board of Public Utilities to make thorough investigation of the affairs of
11 all persons or corporations operating telephone systems (and other public utilities), in said city, and to compile such data as may be necessary to determine the proper charges for the services furnished or supplied by such persons or corporations, and that such data shall include a valuation of the physical properties of such persons or corporations, and that said Board shall have the right to examine all of the property and books and records of such persons or corporations.

That prior to the adoption of its aforesaid resolution by said Board of Public Utilities, there was submitted to said Board an annual statement or report setting forth an estimate of the value of the physical properties of your complainant (exclusive of working capital, as hereinafter explained), comprising its aforesaid telephone system in said City of Los Angeles on the 31st day of December, 1910, together with a statement of the receipts and expenditures of your complainant, in the business of maintaining and operating said telephone system for the calendar year 1910; that the total value of said physical properties, as so estimated and stated in said report, was the sum of $5,764,545.59; and complainant further avers that, prior to the adoption of said resolution, said Board, by its own members, and by engineers and other experts employed by it, made inquiry into the property and affairs of your complainant, and held various hearings at which evidence, concerning the said matters, was received by said Board; and thereafter the said Board made its findings and report upon said matters, and after the making of said findings and report adopted the afore-

said resolution prescribing the rates to be charged by your complainant and the aforementioned competing system for telephone services during said year commencing July 1, 1911.

X.

That your complainant, finding itself compelled to seek
12 relief through judicial proceedings against the unjust and confiscatory rates prescribed by said ordinance of July 28th, 1911, has, since the passage of said ordinance, caused a wholly new inventory and appraisement of its properties to be made, based upon a careful and detailed examination and investigation of all parts of the plant and properties of complainant, and of the present value thereof, except such parts as were already exhibited in detail by existing records; that your complainant has used every endeavor to make such inventory and appraisement complete and accurate, and for that purpose delayed the filing of its original bill of complaint herein (which said bill was so filed on December 12th, 1911); that the making of such a complete and accurate inventory and appraisement requires a great deal of time and a large expenditure of money, and that your complainant had not, for some years prior to the adoption of said ordinance of July 28, 1911, felt justified in incurring the expense of having made such a full and complete inventory and appraisement of its said properties; that as a result of the making of the aforesaid new inventory and appraisement, finally completed in the month of November, 1911, your complainant has ascertained that the estimate of the total value of its said properties on December 31st, 1910, contained in said annual statement and report, as aforesaid, was considerably less than the actual value thereof on that date. That in and by said inventory and appraisement completed in November, 1911, complainant has determined, as accurately as possible, the values of the physical properties comprised in its said system at the close of business on the 30th day of June, 1911 (having made due allowance for additions and other changes between last said date and the taking of said inventory) and that the values as so determined are summarized and set forth in the following table, and
complainant alleges that said values are as accurate and
13 just as complainant is able to determine the same, and that the aggregate of said values does not exceed the total value on said 30th day of June, 1911, of the said properties of complainant, comprised in its said telephone system in said City of Los Angeles, to-wit:

Central Office Exchange Equipment	$1,868,835.34
Underground Conduit and Manholes	607,518.55
Pole Lines	523,912.57
Aerial Cable	569,365.52
Underground Cables	800,984.67
Building Cables	20,368.79
Aerial and Underground Terminals	91,842.59
Aerial Wires	341,466.78

Drop Wires	153,856.20
Subscribers' Station Equipment	1,265,267.19
Private Branch Exchanges	152,687.38
Buildings	333,659.36
Land	274,005.00
Furniture and Fixtures	12,375.26
Tools, Implements, Machinery and Vehicles	7,874.20
Supplies and Materials	102,438.20
Total	$6,928,457.55

XI.

That the aforesaid summary of appraisement and table of values contains the values only of the physical properties comprised in complainant's said telephone system, and does not contain any estimate of, or allowance for, the value of complainant's said franchise, nor the value of complainant's said telephone business and system as a going concern, nor the value of the good will or earning capacity of said business and system, nor any estimate of, or allowance for, working capital.

That in a business of the character and extent of said business of your complainant, it is not possible to pay, out of the current receipts from the earnings of the business, all the expenses and charges of operation and maintenance at the time when it is necessary or advantageous to pay the same; and for that reason it is necessary for the complainant, in conducting its said business, to have invested therein, as working capital, a considerable amount of money over and above the cost and value of all its other
14 properties, including supplies and stores on hand.

That the value of complainant's aforesaid intangible assets, to-wit, said franchise, going concern, good will and earning capacity, together with said necessary working capital, aggregate a large amount, and that your complainant is justly entitled to a reasonable return thereon as well as upon the value of its physical properties aforesaid; but your complainant further avers that, as hereinafter more specifically shown, the earnings of the business of your complainant, under the schedule or rates fixed by said ordinance of July 28, 1911, will afford a wholly inadequate return upon the value of complainant's said physical properties alone, and said rates so fixed are shown to be unreasonably low and confiscatory without regard to the amount or value of complainant's aforesaid intangible assets and working capital.

XII.

That your complainant owns and operates a small amount of telephone plant and equipment outside of, and in the territory adjacent to, said City of Los Angeles. That a portion of the earnings of complainant's said telephone system, inside said city, other than telephone rentals, is derived from services rendered, or business done, in connection with the operation of said telephone

system located outside of said city, and that the portion of such common earnings, properly creditable to the said telephone system inside said city, can only be arrived at by taking a proportion of such common earnings, based upon the relative amount of the total services rendered, and business done, by said telephone systems, inside and outside said city, respectively, as determined by the relative amounts derived from said systems, respectively, for telephone rentals. That the total gross earnings of com-
15 plainant's said telephone business, both inside and outside said City of Los Angeles, during said year commencing July 1, 1910, was the sum of $1,220,177.55; and that the total gross earnings, derived from the operation of complainant's said telephone system inside said city, including its due proportion of the aforesaid common earnings, was the sum of $1,192,622.89, and that the following is a more particular statement of last said gross earnings, showing the several sources thereof, to-wit:

Rental Subscribers' Equipment	$1,110,754.92
Proportion Long Distance and Local Calls from U. S. Long Distance Telephone Co.	24,172.65
Lines to City Limits for Glendale	900.—
Rent of Rooms and Buildings	6,139.50
Lines rented to Fire Alarm and Police Telegraph Department	4,991.30
Directory and Advertising	36,837.07
Miscellaneous Earnings for Collection charges	6,617.02
Miscellaneous Earnings from Sundry equipment	2,176.76
Pole Attachment Rentals	33.67
Total Gross Earnings	$1,192,622.89

XIII.

That the major portion in value of the physical properties comprised in complainant's said telephone system, which is nearly all of the type known as automatic, consists of electrical and mechanical appliances and equipment manufactured or adapted only for use in the operation of a telephone system; that such appliances and equipment so used in such a telephone system are subject to more or less deterioration in quality and condition and depreciation in value on account of age and length of service, although if properly repaired and maintained, they are physically capable of a long term of efficient service; but complainant further alleges that the progress of invention and improvements in the art of design-
ing and constructing such telephone appliances and equipment has been very rapid in the past and there is every reason to
16 anticipate a like rapid progress of such art in the future; that the population of the City of Los Angeles in recent years has also increased and spread over new territory very rapidly, and that the causes of such rapid increase and spread of population still exist and will undoubtedly continue to exist in the future, and additional causes thereof are likely to develop, and by reason

thereof the rate of increase and spread of population of said city in the future will be greater rather than less than in the past; that the aggregate number of patrons or subscribers of your complainant's said telephone system has likewise steadily and rapidly increased, and the distribution thereof in the territory served by your complainant greatly changed, contemporaneously with the aforesaid increase and spread of the population of said city, and that in the normal and ordinary course of events such increase in number and such changes in the distribution, of the partons served by complainant's said system will continue and accelerate rather than decrease in the future; and that by reason of such progress in the telephone art and such increase in the number, and changes in the distribution, of patrons, it has universally been found necessary, in the operation of telephone systems in the past, and in the operation of complainant's said systems it will in the future be necessary to abandon and discontinue the use of large amounts of appliances and equipment, of great value, long before the natural period of usefulness thereof has been realized. That it is impossible to anticipate the nature and direction of such progress of the art, or to anticipate the amount or direction of such changes in the number or distribution of patrons, or to economically provide for the same in the prior construction of the plant or system. That the adoption and enforcement of police regulations by the municipal and other public authorities from time to time have likewise caused and will, in the future, cause the abandonment
17 and total or partial loss of much valuable equipment and structures.

That the expenditures and losses resulting from the foregoing and other like causes (which are commonly referred to as "'depreciation," or "depreciation and obsolescence") are unavoidable in the conduct of such a telephone system as that of your complainant; and that in order that such system may be maintained in a proper state of efficiency and capacity for service, it is necessary that the corporation owning or conducting the same be able to make the replacements and alterations rendered necessary by said causes, whenever occasion therefor arises; that it is impossible to determine in advance the particular times when expenditures for such alterations or replacements will be required, and that the proportionate amount thereof varies with different kinds and classes of telephone appliances and equipment; but experience has shown, and your complainant therefore alleges, that the average annual amount of the losses, due to depreciation and obsolescence, as hereinbefore alleged, is not less than seven per cent of the original cost, in the aggregate, of all of the physical properties comprised in such telephone system other than land and current supplies and materials. That unless an allowance equal to said average annual amount of the losses occasioned, as aforesaid, by depreciation and obsolescence is provided by the earnings for service rendered by such telephone system, over and above a reasonable annual profit or income upon the value of the properties used in rendering such services, the burden of such losses must fall upon the operator or

owner of such system; and if the rates charged and received for the services of such system are allowed to be fixed by authority of the state at a standard which does not so provide an adequate allowance for such losses, the operator or owner of such system is thereby deprived of his property without due process of law,
18 and denied the equal protection of the laws.

XIV.

That the actual and necessary current expenses of the business of complainant's said telephone system in said City of Los Angeles, including its just proportion of expenses common to said system outside of said city, during said year commencing July 1, 1910, together with the average annual allowance necessary to be provided, as aforesaid, on account of losses due to depreciation and obsolescence, amounted to the aggregate sum of $1,153,849.69; and that the following is a more particular statement thereof, to-wit:

Operating	$126,968.81
Maintenance	276,282.23
General (other than taxes and licenses)	122,065.47
City and County General Taxes	66,702.69
City 2% Tax	20,729.46
State License Tax	250.—
City License Tax	600.—
U. S. Revenue Tax	65.33
Directory	30,113.04
Allowances for depreciation and obsolescence	510,072.66
Total	$1,153,849.69

That the total current expenses of the business of complainant's said system outside of said city during said year, including its just proportion of the expenses common to said system in said city (but not including any allowance for depreciation or obsolescence), amounted to the sum of $13,056.82.

XV.

That the net returns, that is to say, the excess of the gross earnings, over the total current expenses and allowance for depreciation and obsolescence, as aforesaid, of complainant's said telephone system in the City of Los Angeles, during said year commencing July 1, 1910, amounted to only .5597 of one per cent. upon the value of the aforesaid physical properties comprised in complainant's said telephone plant or system, and necessarily used in the oper-
19 ation thereof during said year. That the total value of the physical properties comprised in and used in the operation of complainant's said telephone plant or system, at all times during said year equalled or exceeded the total value thereof at the end of said year as hereinbefore set forth.

XVI.

That the rates charged and received by the complainant for services rendered by its said telephone system, during said year commencing July 1, 1910, were substantially the same as the rates attempted to be fixed by said ordina-ce of said city, for the year commencing July 1, 1911; that said rates, so charged during the year commencing July 1, 1910, were fixed at the several amounts so charged, by an ordinance adopted by said Council of the City of Los Angeles, against the protest of your complainant, and notwithstanding the fact that the Board of Public Utilities of said City (as constituted under the then existing charter and ordinances of said city, and in pursuance of its powers and duties as established by such charter and ordinances) recommended to said Council the adoption of a materially higher schedule of rates to be charged by your complainant during said year.

That your complainant refrained from seeking relief by judicial proceedings from the rates so fixed by said city Council, for said year commencing July 1, 1910, to avoid vexatious litigation and the loss of the good will of the public, and in order that the precise effect thereof, upon the net returns of the business of your complainant, might be determined by actual experience, and in the hope that a more just and reasonable schedule of rates would be voluntarily fixed by said Council, and allowed to be charged by your complainant in the year commencing July 1, 1911, and succeeding years.

That the said Board of Public Utilities (as constituted under the present provisions of the charter of said City of Los Angeles, as hereinbefore stated) did attempt to fix such a higher schedule of rates, by its resolution adopted as hereinbefore alleged; but that said City Council, against the protest of your complainant, and notwithstanding said Council was fully advised of such action by said Board of Public Utilities, and of the aforesaid findings and report of said Board, upon which the rates attempted to be fixed by said Board was based as aforesaid, and without receiving or seeking any further evidence concerning the value of complainant's properties, or the actual returns of said business during said year commencing July 1, 1910, or of the rates charged for similar telephone services, rendered under similar conditions, in other cities of the United States, and without any just cause or reason therefor, set aside the action of said Board of Public Utilities, and by its ordinance to that end adopted, as hereinbefore alleged, attempted to fix the rates to be charged by your complainant during the current year, at approximately the same unjust and unreasonable schedule and standard fixed by said Council for the previous year commencing July 1, 1910.

XVII.

That if the schedule of rates and charges attempted to be fixed by said ordinance of July 28, 1911, should be adhered to, the gross earnings of complainant's said telephone business in said City of Los Angeles, during the current year commencing July 1, 1911, from the same amount of business as was being done by said

telephone system on said 1st day of July, 1911, would be increased by approximately the sum of $967. per month, owing to some slight changes in the rates allowed for certain services; that a schedule showing said changes and the effect thereof, in detail, is hereunto annexed, marked "Exhibit C" and made a part hereof; that there would also be some increase in the said gross earnings, due
21 to natural increase in the total amount of business done by complainant's said telephone system; but that the current expenses of maintaining and operating said system will increase in greater proportion than any possible increase of gross earnings under such rates, for the reason that, owing to the peculiar nature of the telephone business, the average cost of the services rendered to each subscriber or patron increases in a higher ratio than the increase of total number of subscribers or patrons (the increase in subscribers also largely increasing the value of the service to each subscriber); and for the further reason that the average normal expense of maintenance and repair of many parts of said telephone plant and equipment increases from year to year, because of the increasing deterioration thereof with age.

Complainant anticipates that, owing to the change in the mode of taxation effected by recent changes in the constitution and statutes of the State of California, the amount of taxes (other than licenses and the franchise tax of two per cent. of gross income, payable to the City of Los Angeles) to be paid by complainant during the current year, will be somewhat reduced as compared with the amount of such taxes paid during the year ending June 30, 1911; but complainant avers that the amount of such reduction, if any, will be offset in part by the increase in the franchise tax of two per cent. of gross income payable to the City of Los Angeles, and that in any event, such reduction in the total amount of taxes paid will be much less than the unavoidable increase of other expenses of maintenance and operation as hereinbefore alleged; and further aver that the ratio of the actual and necessary current expenses of said telephone system to the gross earnings thereof, computed according to
22 the rates fixed by said ordinance of July 28, 1911, has been substantially greater during the period which has elapsed since June 30, 1911, than during the year ending June 30, 1911.

Your complainant therefore avers and alleges that unless it is allowed to charge and collect higher rates than the rates attempted to be fixed by said ordinance of July 28, 1911, the percentage of net returns to the complainant from the business of its said telephone system in said City of Los Angeles, during said year commencing July 1, 1911, upon the value of the physical properties necessarily used in the operation of said system, will be less than the percentage of such net returns during said year commencing July 1, 1910, as hereinbefore alleged.

XVIII.

That your complainant, as the owner and operator of said telephone system in the City of Los Angeles, is entitled and ought to be allowed to charge such rates for the services rendered by said system, as will yield to complainant a just, fair and reasonable net

return upon the value of all the property, including complainant's aforesaid intangible assets and necessary working capital, actually and necessarily employed in the operation of said system, and the rendering of such services; that such return would be not less than ten per cent per annum upon the value of all said property, over and above the necessary current expenses of maintaining and operating the same, and over and above the proper allowance, as hereinbefore alleged, to provide against necessary losses by depreciation and obsolescence of the plant and equipment comprised in said system; that the usual net return received by capital in equally, or less, hazardous investments in said city of Los Angeles, and the vicinity thereof, the rates or earnings whereof are not subject to regulation by public authority, is not less than said rate
28 of ten per cent per annum; that if your complainant were allowed to charge and receive rates which would allow the return to complainant from its said business, to which it is entitled, as aforesaid, such rates would, nevertheless, be fair and reasonable to the subscribers and patrons of said business, and would not exceed the fair or reasonable value of the services rendered, for which said rates would be so charged, and said rates would be less than the rates charged for like services rendered under the same, or similar, conditions in other cities in the United States; and that, if said ordinance of July 28, 1911, is enforced, and your complainant thereby prevented from charging and from collecting higher rates than the rates purporting to be fixed by said ordinance, the State of California will thereby deprive your complainant of its property without due process of law, and deny to your complainant the equal protection of the laws, contrary to the provisions of the Constitution of the United States.

XIX.

That in and by the terms of said ordinance of July 28, 1911, it is made a misdemeanor, punishable by fine or imprisonment, or both, for your complainant, or any officer or agent thereof, to demand, charge collect or receive any rates in excess of the rates, purporting to be prescribed by said ordinance; and that, if your complainant should collect, charge or demand rates in excess of the rates purporting to be prescribed by said ordinance, without first obtaining the judgment or order of a court of equity, annulling said ordinance, and enjoining the enforcement thereof, the defendants above named would cause your complainant and its officers and agents collecting, charging, or demanding such greater rates, to be prosecuted under the aforesaid penal provisions of said ordinance, and your complainant would also be subject to numerous suits by individual
24 patrons or subscribers seeking to compel complainant, by the judgment and process of the courts, to furnish telephone services at the rates purporting to be prescribed by said ordinance of July 28, 1911; that your complainant must therefore either refrain from collecting higher rates than the rates prescribed by said ordinance, or subject itself and its officers and agents to the harassment and annoyance of innumerable criminal prosecutions and civil suits at law; and that it would be utterly impracticable for

your complainant, or its officers or agents, to establish in each of such suits or prosecutions, the defense that the rates attempted to be fixed by said ordinance are unreasonable and confiscatory; and there is no remedy or proceeding at law, whereby your complainant may obtain relief from, or prevent, the enforcement of said ordinance, and the said defendants threaten to, and will, unless restrained by the order or decree of this honorable court, enforce the said ordinance against your complainant, in the manner aforesaid, to the great and irreparable injury and loss of your complainant.

XX.

Your complainant further avers and alleges that although this court shall, by its final decree herein, determine and adjudge that the said ordinance of July 28, 1911, is unreasonable and void, and enjoin the enforcement thereof, it will nevertheless be impossible for your complainant to collect or recover the full amount of compensation to which your complainant will be justly entitled for services rendered by its said telephone system during said year commencing July 1, 1911, prior to the entry of such decree, because of the very great number, to-wit, upwards of thirty thousand, of individuals and corporations to whom such services are rendered from month to month; that many of such persons and corporations are insolvent, or unable to respond in damages, and that (although your complainant does not accept payment for services of said telephone system at the inadequate rates prescribed by said ordinance, except under protest, and expressly reserving the right to collect such additional rates as may be just and legal) unless complainant is enabled to collect the full amount of its just charges for such services, monthly in advance, a great part thereof will be lost to your complainant, to its great and irreparable injury; and therefore your complainant further avers and alleges that your complainant will be afforded only partial relief from the unjust, unlawful and oppressive provisions of said ordinance, unless this court shall enjoin the enforcement thereof, pending the final hearing and decree in this suit, upon such terms and conditions as the court may deem just and equitable.

XXI.

That without knowing the exact amount and kind of business which might be done by your complainant's said system during the year, it cannot be determined precisely what the earnings or expenses of said system would have been if complainant had been allowed to charge the schedule of rates prescribed by the resolution of said Board of Public Utilities, as hereinbefore alleged; but your complainant alleges that if it had continued to do substantially the same amount and kind of business throughout the year commencing July 1, 1911, which it was doing at the close of the previous year, and had charged and received therefor the schedule of rates so prescribed by said Board of Public Utilities, the net earnings of complainant's said system would have been sufficient to provide the

allowance necessary to meet expenditures and losses necessarily due to depreciation and obsolescence as hereinbefore set forth, and to yield, in addition thereto, a small return, upon the value of said physical properties comprised in complainant's said system; and your complainant avers that while such rate of return would
26 not have been fully adequate and just to your complainant and the numerous individuals who have invested in its corporate securities, your complainant would have submitted to such schedule of rates so prescribed by said Board of Public Utilities, rather than incur the great expense and vexation of litigation, and the loss of the good will of the public by reason of such litigation in resistance of such rates. And your complainant further avers that it is now willing, as a condition of the granting of an interlocutory injunction herein, to accept and charge, during the continuance of such injunction, a schedule of rates not exceeding the rates so prescribed by the resolution of said Board of Public Utilities, for all services in respect to which the rates so prescribed by said Board of Public Utilit-es were higher than the rates purporting to be fixed by said ordinance of July 28, 1911, and not exceeding the rates prescribed by said ordinance for other services.

To the end therefore that your complainant may have that relief which it can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, an answer under oath being hereby expressly waived, your complainant now prays the court.

1. That it be adjudged and decreed that the said ordinance adopted by said Council, and approved by the said Mayor of the City of Los Angeles, on July 28, 1911, is void and not binding upon your complainant, because in contravention of the Constitution of the United States, in that by said ordinance, if enforced, the State of California will deprive your complainant of its property, without due process of law, and will deny to your complainant the equal protection of the laws.

2. That upon the final hearing of this cause, it be adjudged and decreed that complainant be granted a writ of injunction
27 issuing out of, and under the seal of, this honorable court, against the defendants, perpetually enjoining and restraining them and each of them, and all persons acting by or under their authority, as officers, agents, servants or employés, or otherwise, from in any manner enforcing, or attempting to enforce, said ordinance, or any of the provisions thereof; and that upon the filing of this bill, this court make its order, directed to said defendants and each of them commanding them and each of them to be and appear before this honorable court, at a time and place certain, then and there to show cause, if any they have, why this honorable court should not enjoin said defendants, and all persons acting by or under their authority, in the manner above stated, pending the final hearing of this cause, and entry of decree therein; and that, upon the hearing of said order to show cause, this honorable court, grant complainant its interlocutory injunction, so restraining said defendants, and all persons acting by or under their authority.

3. Complainant further prays that if, at any time after the granting of such interlocutory injunction, and prior to the entry of final decree in this cause, any person, other than the said defendants, shall attempt to enforce the provisions of said ordinance, or deny to the complainant the rights secured by such interlocutory injunction, such person or persons, or some of them in behalf of all, be made parties defendant herein, and each of them be enjoined and restrained, as herein before prayed, and that your complainant be granted such further and other relief as to the court may seem meet and agreeable to equity.

Your complainant further prays that this honorable court grant unto it a writ of subpœna, to be directed to the said defendants, commanding them and each of them, at a certain time and
28 under a certain penalty therein to be limited, to appear before this honorable court, and then and there full, direct, true and perfect answers make to all and singular the premises, but not under oath, and to stand, do, perform and abide by such order, direction and decree as may be made against them in the premises, as shall seem meet and agreeable to equity.

And your complainant will ever pray.

[CORPORATE SEAL.] HOME TELEPHONE & TELEGRAPH COMPANY,
By A. B. CASS, *President.*
GIBSON, DUNN & CRUTCHER,
Solicitor- for Home Telephone & Telegraph Company.

JAS. A. GIBSON,
JAS. A. GIBSON,-
Of Counsel.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

A. B. Cass being first duly sworn, deposes and says:

That he is an officer, to-wit, the President of Home Telephone & Telegraph Company, a corporation, the complainant mentioned in the foregoing Amended Bill of Complaint, and makes this verification for and on behalf of said complainant; that he has read the foregoing Amended Bill of Complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and that as to those matters he believes said Amended Bill of Complaint to be true.

A. B. CASS.

Subscribed and sworn to before me this 23rd day of February, 1912.

F. W. REA, [NOTARIAL SEAL.]
Notary Public in and for the County of Los Angeles, State of California.

"Exhibit A."

Rate Resolution No. 3.

A Resolution of the Board of Public Utilities of the City of Los Angeles Fixing the Rates to be Charged and Collected for Telephones, Telephone Service, and Telephone Connections in the City of Los Angeles During the Year Commencing July 1, 1911, and Ending June 30, 1912.

Be it resolved and ordered by the Board of Public Utilities of the City of Los Angeles as follows:

Section 1. That the rates to be charged and collected for telephones, telephone service and telephone connections in the City of Los Angeles, furnished to the City of Los Angeles, or to the inhabitants thereof, for the year commencing July 1, 1911, and ending June 30, 1912, except as provided in sections 2, 3, 4 and 5 of this resolution, are hereby fixed as follows:

1. For each telephone installed and maintained in any business office, or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $5.75 per month.

2. For each telephone installed and maintained in any business office or premises, connected with the central exchange by a two-party line circuit, with unlimited service, $4.50 per month.

3. For each sending telephone installed and maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $5.75 per month. For the purposes of this resolution a sending telephone is defined to be one from which connection may be obtained with the central exchange, and through such exchange with other telephones, and which cannot be called by the central exchange for the purpose of communication with other telephones.

4. For each receiving telephone installed and maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $5.75 per month. For the purposes of this resolution a receiving telephone is defined to be one from which connection cannot be obtained with the central exchange unless such telephone is called by such central exchange.

5. For each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service $2.50 per month.

6. For each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange by a two-party line circuit, with unlimited service, $2.25 per month.

7. For each telephone installed and maintained in any house or place other than a business office or premises, connected with the

central exchange by a four-party line circuit, with unlimited service, $1.75 per month.

8. For each suburban telephone installed and maintained in any business office or premises, or in any residence, house or place, connected with the central exchange by a party line circuit having not over ten stations, with unlimited service, $2.50 per month. For the purposes of this resolution a suburban telephone is defined as a telephone on a party line circuit having ten or less telephones and located within the city limits of Los Angeles and between the center lines of Manchester Avenue on the north and Ballona Avenue (Howard Townsite) on the south.

9. For each telephone installed and maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with service limited to one hundred calls per month, $5.00 per month; and two cents additional
31 for each call in excess of one hundred in any month.

10. For each telephone installed and maintained in any business office or premises connected with the central exchange by an independent or individual circuit, with service limited to sixty calls per month, $4.00 per month; and three cents additional for each call in excess of sixty in any month.

11. For each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange by an independent or individual circuit, with service limited to fifty calls per month, $2.00 per month; and two cents additional for each call in excess of fifty in any month.

12. For each telephone provided with a coin or nickel-in-the-slot prepayment device, installed and maintained in any business office, or premises, or public place and connected with the central exchange by an independent or individual circuit, with service limited to three calls per day, fifteen cents per day; and five cents additional for each call in excess of three in any day.

Of the five cents additional for each call in excess of the three in any day, the telephone company shall retain three cents and the firm, corporation or person subscribing to the service, two cents.

13. For each extension telephone $1.00 per month.

14. For each extension bell 25 cents per month.

15. For each private branch exchange switchboard located in a business office, hotel, apartment house, or other premises, with unlimited service, $2.00 per month; for each one-way or two-way trunk line connecting such private branch exchange switchboard with the central exchange, with unlimited service, $6.00 per month; for each telephone station in such private exchange, $1.00 per month; provided, that for telephone stations located in any
32 room maintained for the accommodation of a guest or guests and connected with any such private telephone exchange, having more than ten stations, in any hotel, apartment house or lodging house, the rate shall be as follows:

For the first ten stations, fifty cents per month each; for each station from and including the eleventh station to and including the twentieth station, forty-five cents per month; for each station from

and including the twenty-first station to and including the thirty-fifth station, forty cents per month; for each station from and including the thirty-sixth station to and including the fiftieth station, thirty-five cents per month; for each station in addition to the fiftieth station twenty-five cents per month.

For the purposes of this resolution a private branch exchange is defined to be a private telephone system with a switchboard for connecting the individual private telephone lines with each other or with the central exchange, but wherein the private telephone stations are not provided with individual facilities for establishing connections with each other or with the central exchange.

16. For each one-way or two-way unlimited service trunk line connecting an intercommunicating system, located in any business office or premises, with the central exchange, $6.00 per month; for each telephone station, including the receiving station, in such intercommunicating system with unlimited service, $1.25 per month. For the purpose of this resolution an intercommunicating system is defined to be a private telephone system wherein each station is provided with individual facilities for establishing connections with the trunk lines leading to the central exchange and with the individual lines of the other stations in the same private telephone system.

33 17. For each one-way or two-way unlimited service trunk line connecting an intercommunicating system, located in any house or place other than a business office or premises, with the central exchange, $4.00 per month; for each telephone station, including the receiving station, in such intercommunicating system with unlimited service, $1.25 per month.

18. For each private branch exchange switchboard, located in a business office or premises with limited service, $1.00 per month; for each one-way or two-way trunk line connecting such private branch exchange switchboard with the central exchange, with service limited to one hundred calls per month for each trunk $4.00 per month and two cents additional for each call in excess of one hundred calls per trunk per month; for each telephone in such limited service private branch exchange, 75 cents per month.

19. For each private branch exchange switchboard, located in any hotel, apartment house or lodging house for the accommodation of guests, with limited service, $1.00 per month; for each one-way or two-way trunk line connecting such private branch exchange switchboard with the central exchange, with service limited to one hundred calls per month for each trunk; $4.00 per month and two and one-half cents additional for each call in excess of one hundred calls per trunk per month; for each telephone in such limited service private branch exchange 25 cents per month.

20. For each one-way or two-way trunk line connecting an intercommunicating system located in any business office or premises with the central exchange with service limited to one hundred calls per trunk per month, $4.00 per month, and two cents additional for each call in excess of one hundred calls per trunk per month; for

each telephone, including the receiving station, in such limited service intercommunicating system, $1.00 per month.

34 21. Where the owner or proprietor of any hotel, apartment house or lodging house shall enter into a contract for ten or more unlimited service telephones connected with the central exchange by independent or individual circuits, as provided for in paragraph 5 of this section, or for ten or more unlimited service telephones connected with the central exchange by two-party line circuits, as provided for in paragraph 6 of this section, and for use in the respective rooms or apartments in such hotel, apartment house or lodging house, a reduction of fifty cents per month per telephone from the rates prescribed in paragraphs 5 and 6 of this section shall be allowed. When special facilities are provided in connection with ten or more such one-party or two-party telephones in hotels, apartment houses or lodging houses, whereby direct telephone communication may be had between the various rooms or apartments and the entrance or janitor's quarters of such hotel, apartment house or lodging house, an additional charge of 25 cents per telephone per month shall be made.

22. For the insertion in the telephone directory of any name in addition to the name of the firm, corporation or person subscribing to the service, 50 cents per month, provided the name is that of a member or employee of the firm, an officer or employee of the corporation or a member or employee of the family of the person subscribing to the service; and for all other names $1.00 per month.

23. That the rates fixed by this section shall apply to wall telephones. An additional charge of twenty-five cents per month shall be made for each portable desk telephone, provided such additional charge for portable desk telephones shall not apply to extension or private branch exchange telephones.

35 SEC. 2. That the rates to be charged and collected for telephones, telephone service and telephone connections in the City of Los Angeles, furnished by the San Pedro Home Telephone Company to the City of Los Angeles, or to the inhabitants thereof, for the year commencing July 1, 1911, and ending June 30, 1912, are hereby fixed as follows:

For each telephone installed and maintained in any business office or premises connected with the central exchange by an independent or individual circuit, with unlimited service, $2.50 per month; for each telephone installed and maintained in any business office or premises connected with the central exchange by a two-party line circuit with unlimited service, $2.00 per month; for each telephone installed and maintained in any business office or premises connected with the central exchange by a four-party line circuit, with unlimited service, $1.75 per month; for each telephone installed and maintained in any house or place other than a business office or premises connected with the central exchange by an independent or individual circuit, with unlimited service, $1.50 per month, for each telephone installed and maintained in any house or place other than a business connected with the central exchange by a four-party line circuit, with unlimited service, $1.35 per month; for each telephone installed and maintained in any house or place,

other than a business office or premises, connected with the central exchange, by an eight-party line circuit, with unlimited service, $1.00 per month; for each extension wall telephone, sixty cents per month; for each extension portable telephone, eighty-five cents per month. The rates fixed by this section shall apply to both wall and portable telephones, except when otherwise in this section particularly designated.

SEC. 3. That the rates to be charged and collected for tele-
36 phones, telephone service and telephone connections in the City of Los Angeles, furnished by the Pacific Telephone and Telegraph Company to the City of Los Angeles or to the inhabitants thereof, through the exchange maintained and operated by said company in that portion of said city formerly included within the corporate limites of the City of San Pedro as the said City of San Pedro existed prior to the consolidation of the cities of Los Angeles and San Pedro, for the year commencing July 1, 1911, and ending June 30, 1912, are hereby fixed as follows:

For each telephone installed and maintained in any business office or premises connected with the central exchange by an independent or individual circuit with unlimited service, $2.50 per month; for each telephone installed and maintained in any business office or premises connected with the central exchange by a two-party line circuit, with unlimited service, $2.00 per month; for each telephone installed and maintained in any house or place other than a business office or premises connected with the central exchange by an independent or individual circuit, with unlimited service, $2.00 per month; for each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange by a two-party line circuit, with unlimited service, $1.50 per month; for each telephone installed and maintained in any house or place other than a business office or premises, connected with a central exchange by a four-party line circuit, with unlimited service, $1.25 per month.

For each extension telephone, either wall or portable, installed and maintained in any business office or premises, $1.00 per month; for each extension wall telephone installed and maintained in any house or place other than a business office or premises, sixty cents per month; for each extension portable telephone installed
37 and maintained in any house or place other than a business office or premises eighty-five cents per month.

SEC. 4. That the rates to be charged and collected for telephones, telephone service and telephone connections in the City of Los Angeles furnished by the Pacific Telephone and Telegraph Company to the City of Los Angeles or to the inhabitants thereof, through the exchange maintained and operated by said company in that portion of said city formerly included within the corporate limits of the City of Wilmington as the said City of Wilmington existed prior to the consolidation of the cities of Los Angeles and Wilmington, for the year commencing July 1, 1911, and ending June 30, 1912, are hereby fixed as follows:

For each telephone installed and maintained in any business office

or premises connected with the central exchange by a six-party line circuit, with unlimited service, wall $1.50 per month, portable $1.75 per month; for each telephone installed and maintained in any house or place other than a business office or premises connected with the central exchange by a six-party line circuit, with unlimited service, $1.50 per month. The rates fixed by this section shall apply to both wall and portable telephones, except when otherwise in this section particularly designated.

SEC. 5. That the rates to be charged and collected for telephones, telephone service and telephone connections in the City of Los Angeles, furnished by the Consolidated Utilities Company of Compton to the City of Los Angeles or to the inhabitants thereof for the year commencing July 1, 1911, and ending June 30, 1912, are hereby fixed as follows:

For each telephone installed and maintained in any business office, house or other premises connected with the central exchange by an independent or individual circuit with unlimited service, $2.50 per month; for each telephone installed and maintained in any business office, house or other premises connected with
38 the central exchange by a party line circuit, with unlimited service, $1.50 per month.

SEC. 6. It shall be unlawful for any person, firm or corporation, either as principal, agent, employee or otherwise, to charge, demand, collect or receive any rate or compensation for telephones, telephone service and telephone connections during the year commencing July 1, 1911, and ending June 30, 1912, to the City of Los Angeles or to any inhabitant thereof in excess of the rate fixed by this resolution.

SEC. 7. It shall be unlawful for any person, firm or corporation, either as principal, agent, employee, or otherwise, to charge, demand, collect or receive any rate or compensation for telephones, telephone service or telephone connections supplied during the year commencing July 1, 1911, and ending June 30, 1912, to the City of Los Angeles, or to any inhabitant thereof, less than the rate fixed by this resolution, unless an application for a reduction in such rate is made by the person, firm or corporation so supplying such telephones, telephone service or telephone connections and the consent of the Board of Public Utilities thereto is obtained in the manner hereinafter provided. Such application shall be in writing and shall be signed by the person, firm or corporation making the same, and shall be filed with the Board of Public Utilities and shall state the rate desired to be established. Said application shall be considered by said Board of Public Utilities, and if granted, said Board shall make an order, which shall specify the changed rate, and the date when the same shall become effective. Said order shall be published for five (5) days in a daily newspaper printed, published and circulated in said city before said order takes effect. Upon and after the date so designated in such order, the rate stated in such order, made by said Board of Public Utilities, shall be the only lawful rate to be charged, demanded, collected or received by the
39 person, firm or corporation making such application, and upon and after such date it shall be unlawful for such person,

firm or corporation, or for any agent or employee of such person, firm or corporation, to charge, demand, collect or receive any rate or compensation in excess of the rate so designated in such order; provided, however, that such rate may be thereafter increased by making application for such increase in the same manner as herein provided for the decrease in such rates, but no such rate shall be increased to an amount in excess of the rate established by this resolution. No such decrease or increase of any rate or schedule of rates specified in this resolution shall be effected without the consent in writing first granted by the Board of Public Utilities, as herein provided.

SEC. 8. It shall be unlawful for any person, firm or corporation, either as principal, agent, employee or otherwise, to charge, demand, collect or receive from the City of Los Angeles or from any person, firm or corporation therein, any rate or compensation for telephones, telephone service and telephone connections, during the year commencing July 1, 1911, and ending June 30, 1912, greater or less than the rate or compensation charged, demanded, collected or received from any other person, firm or corporation for the same service.

SEC. 9. It shall be unlawful for any person, firm or corporation which has not, as provided by section 7 of this resolution, established rates different from those established by this resolution, or for any officer, agent, collector or employee of such person, firm or corporation, directly or indirectly, by any special rebate, drawback, or other device, or in any manner or form, or by any means, to charge, demand, collect or receive any rate or rates, or payment or compensation or consideration, for telephones, telephone service and telephone connections greater or less than or different from the rates fixed by this resolution.

SEC. 10. Nothing in this resolution contained shall apply to the furnishing of free telephones, telephone service or telephone connections to the City of Los Angeles pursuant to any ordinance or franchise.

SEC. 11. That any person, firm or corporation violating any of the provisions of this resolution shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than five hundred (500) dollars, or by imprisonment in the city jail for a period of not more than six months, or by both such fine and imprisonment.

SEC. 12. The Secretary of the Board of Public Utilities shall certify to the passage and adoption of this resolution and file a copy of the same, certified by said Secretary, with the City Clerk of the City of Los Angeles.

I hereby certify that the whole number of members of the Board of Public Utilities of the City of Los Angeles is three (3) and that the resolution, of which the foregoing is a copy, was passed and adopted by a majority vote of said Board at its meeting of June 13, 1911, by the following vote, to wit:

Ayes: Commissioners Lissner and Darlington.
Noes: None.

THEO. B. COMSTOCK,
Secretary of the Board of Public Utilities of the City of Los Angeles.

41 "EXHIBIT B."

Ordinance No. 23,122.

(New Series.)

An Ordinance Finally Fixing the Rates to be Charged and Collected by the Home Telephone and Telegraph Company, a Corporation, for Telephones, Telephone Service, and Telephone Connections in the City of Los Angeles, During the Year Commencing July 1, 1911, and Ending June 30, 1912, and Changing and Modifying the Rates for such Service as Fixed by the Board of Public Utilities of the City of Los Angeles.

Whereas, the Board of Public Utilities of the City of Los Angeles, did, by Rate Resolution No. 3, entitled, "A Resolution of the Board of Public Utilities of the City of Los Angeles, fixing the rates to be charged and collected for telephones, telephone service and telephone connections in the City of Los Angeles, during the year commencing July 1, 1911 and ending June 30, 1912," adopted by said Board on the 13th day of June, 1911, fix the rates to be charged and collected for telephones, telephone service and telephone connections to the City of Los Angeles, or to the inhabitants thereof, for the year commencing June 1, 1911 and ending June 30, 1912; and,

Whereas, immediately upon the adoption of said resolution by said Board of Public Utilities, a copy of said resolution certified by the Secretary of said Board, was filed in the office of the City Clerk, and said City Clerk did present said resolution to the Council at its next regular meeting and did cause said resolution to be published for five days in the Los Angeles Daily Journal, a daily newspaper printed and published and circulated in said city, as required by the charter of said city; and,

Whereas, within fifteen (15) days after the expiration of the publication of said resolution, as aforesaid, certain persons, firms, and corporations interested in or affected by such rates did file objections thereto with the City Clerk, specifying the grounds of such objections and did petition the council for a rehearing of such rates; and,

42 Whereas, the City Clerk did lay all such objections before the Council at its next regular meeting after the expiration of the time for filing such objections, to-wit, at the regular meeting of said Council held on the 11th day of July, 1911, and the Council did thereupon proceed to consider such objections and did, by a vote of not less than two-thirds of its members, order a rehearing of said rates, and did fix a time for considering such rates and hearing and

passing upon the objections thereto, to-wit, the 17th day of July, 1911, which day last aforesaid was not less than three days nor more than ten days after the rehearing of such rates had been ordered; and,

Whereas, after such rehearing of such rates had been ordered by the Council, as aforesaid, the City Clerk did on the 14th day of July, 1911, notify each person, firm or corporation, by or on whose behalf such objections had been made and did notify each person, firm or corporation engaged in the business of furnishing telephones, telephone service and telephone connections to the City of Los Angeles, or to the inhabitants thereof, and whose rates were to be considered and finally fixed, of the time and place appointed for such rehearing, by depositing in the Post Office of the City of Los Angeles, postage prepaid, a notice addressed to each such person, firm or corporation specifying in such notice the time and place of such rehearing and did file a similar notice forthwith in the office of the Board of Public Utilities; and,

Whereas, such rehearing was ordered to be held and was held at the meeting of the Council on the said 17th day of July, 1911, and was thereafter continued, conducted and held by and before said Council until such rehearing was completed, and at such rehearing evidence, both oral and documentary, was submitted to and considered by the Council in relation to and in support of such rates and in support of such objections and in relation to and in support of the rates as fixed by this ordinance; and,

43 Whereas, after hearing such evidence and considering such rates and the objections thereto, the Council did order the said rates as fixed by said Board of Public Utilities to be changed and modified, and that the rates to be charged and collected for such service by the Home Telephone and Telegraph Company, a corporation, be finally fixed as hereinafter provided;

Now, therefore, The Mayor and Council of the City of Los Angeles do ordain as follows:

SECTION 1. That the rates to be charged and collected for telephones, telephone service and telephone connections in the City of Los Angeles, furnished to the City of Los Angeles, or to the inhabitants thereof, by the Home Telephone and Telegraph Company, a corporation for the year commencing July 1, 1911, and ending June 30, 1912 as fixed by the Board of Public Utilities by Rate Resolution No. 3, as aforesaid, be and the same are hereby changed and modified and the rates to be charged and collected for telephones, telephone service and telephone connections in the City of Los Angeles, furnished to the City of Los Angeles or to the inhabitants thereof, by the Home Telephone and Telegraph Company, a corporation, for the year commencing July 1, 1911, and ending June 30, 1912, are hereby finally fixed as follows:

1. For each telephone installed and maintained in any business office, or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $5.00 per month.

2. For each telephone installed and maintained in any business

office or premises connected with the central exchange by a two-party line circuit, with unlimited service, $3.50 per month.

3. For each sending telephone or sending trunk line installed or maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $4.00 per month. For the purpose of this
44 ordinance a sending telephone or a sending trunk line is defined to be one from which connection may be obtained with the central exchange, and through such exchange with other telephones, and which cannot be called by the central exchange for the purpose of communication with other telephone-.

4. For each receiving telephone or receiving trunk line installed and maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $3.00 per month. For the purposes of this ordinance a receiving telephone or receiving trunk line is defined to be one from which connection cannot be obtained with the central exchange unless such telephone is called by such central exchange.

5. For each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $2.00 per month.

6. For each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange by a two-party line circuit, with unlimited service, $1.75 per month.

7. For each telephone installed and maintained in any house or place other than a business office or premises connected with the central exchange by a four party line circuit, with unlimited service, $1.50 per month.

8. For each suburban telephone installed and maintained in any business office or premises, or in any residence, house or place, connected with the central exchange by a party line circuit having not over ten stations, with unlimited service, $2.50 per month. For the purposes of this ordinance a suburban telephone is defined as a telephone on a party line circuit having ten or less telephones and located within the city limits of Los Angeles, and between the center lines of Manchester Avenue on the north and Ballona Avenue (Howard Townsite) on the south.

45 9. For each telephone installed and maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with service limited to one hundred calls per month, $5.00 per month; and two cents additional for each call in excess of one hundred in any month.

10. For each telephone installed and maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with service limited to sixty calls per month, $4.00 per month, and three cents additional for each call in excess of sixty in any month.

11. For each telephone installed and maintained in any house or

place other than a business office or premises, connected with the central exchange, by an independent or individual circuit, with service limited to fifty calls per month, $2.00 per month, and two cents additional for each call in excess of fifty in any month.

12. For each telephone provided with a coin or nickle-in-the-slot prepayment device, installed and maintained in any business office or premises, or public place and connected with the central exchange by an independent or individual circuit, with service limited to three calls per day, fifteen cents per day, and five cents additional for each call in excess of three in any day.

Of the five cents additional for each call in excess of three in any day, the telephone company shall retain three cents and the firm, corporation or person subscribing to the service, two cents.

13. For each extention telephone, $1.00 per month.

14. For each extension bell, 25 cents per month.

15. For each private branch exchange switchboard located in a business office or premises with unlimited service, $1.00 per month, for two-way trunk lines, connecting such private branch
46 exchange switchboard with the central exchange, with unlimited service, $8.00 per month for one trunk line and $6.00 per month for each additional trunk line; for each telephone station in such private exchange, $1.00 per month.

For each private branch exchange switchboard located in any hotel, apartment house or lodging house, with unlimited service, $1.00 per month; for two way trunk lines connecting such private branch exchange switchboard with the central exchange, with unlimited service, $5.00 per month for one trunk line and $4.00 per month for each additional trunk line; for each wall telephone station located in any room maintained for the accommodation of a guest or guests and connected with any such private branch exchange in any such hotel, apartment house or lodging house twenty-five cents per month.

For the purposes of this ordinance a private branch exchange is defined to be a private telephone system with a switchboard for connecting the individual private telephone lines with each other or with the central exchange, but wherein the private telephone stations are not provided with individual facilities for establishing connections with each other or with the central exchange.

16. For each two-way unlimited service trunk line connecting and intercommunicating system, located in any business office or premises, with the central exchange, $6.00 per month, for each telephone station, including the receiving station, in such intercommunicating system with unlimited service, $1.25 per month.

For the purpose of this ordinance an intercommunicating system is defined to be a private telephone system wherein each station is provided with individual facilities for establishing connections with the trunk lines leading to the central exchange and with the individual lines of the other stations in the same private telephone system.

47 17. For each two-way unlimited service trunk line connecting an intercommunicating system, located in any house

or place other than a business office or premises, with the central exchange, including the receiving station, $4.00 per month; for each telephone station, other than the receiving station, in such intercommunicating system, with unlimited service seventy-five cents per month.

18. For each private branch exchange switchboard, located in a business office or premises with limited service, $1.00 per month; for each two-way trunk line connecting such private branch exchange switchboard with the central exchange, with service limited to one hundred calls per month for each trunk, $4.00 per month and two cents additional for each call in excess of one hundred calls per trunk per month; for each telephone in such limited service private branch exchange, seventy-five cents per month.

19. For each private branch exchange switchboard, located in any hotel, apartment house or lodging house for the accommodation of guests, with limited service, $1.00 per month; for each two way trunk line connecting such private branch exchange with service limited to one hundred calls for each trunk per month; $4.00 per month and two and one half cents additional for each call in excess of one hundred calls per trunk per month; for each wall telephone station in such limited service private branch exchange, twenty-five cents per month.

20. For each two-way trunk line connecting an intercommunicating system located in any business office or premises with the central exchange with service limited to one hundred calls per trunk per month, $4.00 per month, and two cents additional for each call in excess of one hundred calls per trunk per month; for each telephone, including the receiving station in such limited service intercommunicating system, $1.00 per month.

48 21. Where the owner or proprietor of any hotel, apartment house or lodging house shall enter — a contract for ten or more unlimited service telephones connected with the central exchange by two-party line circuits as provided for in paragraph 6 of this section and for use in the respective rooms or apartments in such hotel, apartment house or lodging house, a reduction of twenty five cents per month per telephone from the rates prescribed in paragraph 6 of this section shall be allowed. When special facilities are provided in connection with ten or more one-party or two-party telephones in any such hotel, apartment house or lodging house, whereby direct telephone communication may be had between the various rooms or apartments and the entrance or janitor's quarters of such hotel, apartment house or lodging house, an additional charge of twenty-five cents per telephone per month shall be made.

22. Unless otherwise in this section specifically provided, the rates fixed by this section shall apply to wall telephones, provided that an additional charge of fifty cents per month shall be made for each portable telephone installed and maintained in any business office or premises, and an additional charge of twenty-five cents per month shall be made for each portable telephone installed and maintained in any house or place other than a business office or premises, and provided further that such additional charge for portable

telephones shall not apply to extension telephones or telephone stations on private branch exchanges.

SEC. 2. It shall be unlawful for any person, firm or corporation mentioned in this ordinance, either as principal, agent, employee or otherwise, to charge, demand, collect or receive any rate or compensation for telephones, telephone service or telephone connections during the year commencing July 1, 1911 and ending June 30, 1912 to the City of Los Angeles or to any inhabitant thereof in excess of the rate fixed by this ordinance.

SEC. 3. It shall be unlawful for any person, firm or corporation mentioned in this ordinance, either as principal, agent, employee, or otherwise, to charge, demand, collect, or receive any rate or compensation for telephones, telephone service or telephone connections supplied during the year commencing July 1, 1911 and ending June 30, 1912, to the City of Los Angeles, or to any inhabitant thereof, less than the rate fixed by this ordinance, unless an application for a reduction in such rate is made by the person, firm or corporation, so supplying such telephones, telephone service, or telephone connections, and the consent of the Board of Public Utilities thereto is obtained, in the manner hereinafter provided. Such application shall be in writing and shall be signed by the person, firm or corporation making the same and shall be filed with the Board of Public Utilities and shall state the rate desired to be established.

Said application shall be considered by said Board of Public Utilities, and if granted, said Board shall make an order which shall specify the changed rate and the date when the same shall become effective. Said order shall be published for five (5) days in a daily newspaper printed, published and circulated in said city before said order takes effect. Upon and after the date so designated in such order the rate stated in such order, made by said Board of Public Utilities, shall be the only lawful rate to be charged, demanded, collected or received by the person, firm or corporation making such application, and upon and after such date it shall be unlawful for such person, firm or corporation or for any agent or employee of such person, firm or corporation, to charge, demand, collect or receive any rate or compensation in excess of the rate so designated in such order; provided, however, that such rate may be thereafter increased by making application for such increase in the same manner as herein provided for the decrease in such rate, but no such rate shall be increased to an amount in excess of the rate established by this ordinance.

No such increase or decrease of any rate or schedule of rates specified in this ordinance shall be effected without the consent in writing first granted by the Board of Public Utilities as herein provided. And no order of the Board of Public Utilities with reference to the decrease or increase of rates as herein provided shall be effective unless such order be first authorized or approved by the council by ordinance.

SEC. 4. It shall be unlawful for any person, firm or corporation mentioned in this ordinance, either as principal, agent, employee

or otherwise, to charge, demand, collect or receive from the City of Los Angeles or from any person, firm or corporation therein, any rate or compensation for telephones, telephone service, or telephone connections during the year commencing July 1, 1911 and ending June 30, 1912, greater or less than the rate or compensation charged, demanded, collected, or received from any other person, firm or corporation, for the same or equivalent service.

SEC. 5. It shall be unlawful for any person, firm or corporation mentioned in this ordinance which has not, as provided by section 3 of this ordinance, established rates different from those established by this ordinance, or for any officer, agent, collector, or employee of such person, firm or corporation directly or indirectly, by any special rebate, draw-back or other device, or in any manner or form, or by any means, to charge, demand, collect or receive any rate or rates, or payment or compensation or consideration for telephones, telephone service or telephone connections greater or less than or different from the rates fixed by this ordinance.

SEC. 6. Nothing in this ordinance contained shall apply
51 to the furnishing of free telephones, telephone service or telephone connections to the City of Los Angeles pursuant to any ordinance or franchise.

SEC. 7. That any person, firm or corporation mentioned in this ordinance violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than two hundred ($200) dollars, or by imprisonment in the city jail for a period of not more than one hundred (100) days, or by both such fine and imprisonment.

SEC. 8. The City Clerk shall certify to the passage of this ordinance by a unanimous vote and cause the same to be published once in the Los Angeles Daily Journal.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles by the unanimous vote of all the members of said Council present, there being not less than seven members present, at its meeting of July 28, 1911.

LORIN A. HANDLEY,
City Clerk.

Approved this 28th day of July, 1911.

GEO. ALEXANDER, *Mayor.*

52 "EXHIBIT C."

Differences between rates fixed by ordinance of the City of Los Angeles (and actually charged by complain-t) for the year commencing July 1, 1910, and the rates fixed by ordinance of said city for the year commencing July 1, 1911; and also showing difference in monthly gross earnings on amount of business being done by complainant on July 1, 1911.

	No. in use July 1, 1911.	Old rate.	New rate.	Increase in monthly gross earnings.
Business Private Branch Exchange 1st Trunk Lines..	338	6.00	8.00	676.—
Business Private Branch Exchange 2nd and other lines	793	5.00	6.00	793.—
Total increase for month				$1469.—
			Decrease in monthly gross earnings.	
Hotel and Apartment House Private Branch Exchange 1st Trunk Line.....	52	6.00	5.00	52.—
Same, 2nd and other trunk lines	117	5.00	4.00	117.—
Same, Stations	406	.50	.25	101.50
Same, Additional Stations..	437	.45	.25	87.40
Same, Additional Stations..	611	.40	.25	91.65
Same, Additional Stations..	533	.35	.25	53.30
Total decrease for month				$502.85
Increase per month				$1469.00
Decrease per month				502.85
Net increase per month .....,				967.15

Or $11,605.80 per year.

53 (Endorsed:) C. C. No. 1685. U. S. District Court Southern District of California. Home Telephone & Telegraph Company, a corporation, Complainant, vs. City of Los Angeles, et al., Defendants. Amended Bill of Complaint. Due service and receipt of copy of the within Amended Bill of Complaint is hereby admitted this 23rd day of February 1912. John W. Shenk, George E. Cryer, Solicitors for Defendants. Filed Feb. 23, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Gibson, Dunn & Crutcher, Los Angeles, Cal., Att'ys for Complainant.

54 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXander, Mayor of the City of Los Angeles; The Council of the City of Los Angeles and M. F. Betouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants.

Plea.

The joint and several plea of the City of Los Angeles, a Municipal Corporation, George Alexander, Mayor of the City of Los Angeles, The Council of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk and F. J. Whiffen, members of and constituting the Council of the City of Los Angeles, The Board of Public Utilities of the City of Los Angeles,
55 Lewis R. Works, Martin Bekins and Thomas Foulkes, members of and constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, to the Amended Bill of Complaint:

These defendants, respectively, by protestation, not confessing or acknowledge all or any of the matters and things in said complainant's Amended Bill to be true in such manner and form as the same are therein set forth and alleged, for plea to the whole of said Amended Bill say, that this Court ought not to take jurisdiction of this suit for that the said suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of this Court, for as much as the Constitution of the State of California, in Article 1, Section 13 thereof, provides that "No person shall be * * * deprived of life, liberty, or property without due process of law"; that this complainant, a citizen of the State of California, has never invoked the aid or protection of its said state to prevent the alleged taking of its property, nor has complainant appealed to the courts of said state, nor to any of them, to enforce the law of said state.

All of which matters and things these defendants do jointly and severally aver to be true, and they plead to said complainant's

Amended Bill and pray the judgment of this Honorable Court whether they ought to be required to make any other or further answer to said Amended Bill, and pray to be hence dismissed with their costs and charges in that behalf most wrongfully sustained.

JOHN W. SHENK,
City Attorney;
GEO. E. CRYER,
Assistant City Attorney,
Solicitors for Defendants.

56 I, John W. Shenk, Solicitor for the defendants in the above entitled cause, do hereby certify that the above plea is well founded in point of law.

JOHN W. SHENK,
Solicitor for Defendants.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

I, Geo. Alexander — of the City of Los Angeles, and one of the defendants in the above entitled cause, being duly sworn, do say that the foregoing plea to the Amended Bill of Complaint is true in point of fact and is not interposed for the purpose of delay.

GEO. ALEXANDER.

Subscribed and sworn to before me, this 8th day of March, 1912.

[SEAL.] C. H. TRIBIT, Jr.,
Notary Public in and for the County of Los Angeles, State of California.

Original. C. C. No. 1685. U. S. District Court, Ninth Circuit, Southern District of California. Home Telephone & Telegraph Company, a corporation, Complainant, vs. The City of Los Angeles, et al., Defendants. Plea. Received copy of the within Plea this 8th day of March, 1912. Gibson, Dunn, and Crutcher, Attorneys for Complainant. Filed Mar. 8, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. John W. Shenk, City Attorney, 526 Merchants Trust Bldg., Los Angeles, Attorney for Defendants.

57 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation, et al., Defendants.

Stipulation.

It is hereby stipulated, that the Amended Bill of Complaint in the above entitled cause may be amended by striking out the

following words, occurring in lines 13, 14 and 15, on page 20, of said Bill of Complaint, to-wit: "and impair the obligation of the contract created by the granting of complainant's said franchise to maintain and operate said telephone system in said city of Los Angeles".

And also by striking out the following words, occurring in lines 14, 15 and 16, on Page 24, of said Bill of Complaint to-wit: "and will impair the obligation of the contract of your complainant's said franchise".

GIBSON, DUNN AND CRUTCHER,
Solictors for Complainant.
JOHN W. SHENK, *City Attorney.*
GEO. E. CRYER,
Assistant City Attorney,
Solicitors for Defendants.

58 On reading the foregoing stipulation, it is ordered that the Amended Bill of Complaint in this cause be amended as stated in said stipulation, and that the Clerk of this Court be directed to strike out of said Amended Bill of Complaint the words specified in said stipulation by canceling said words on the face of said bill.

OLIN WELLBORN,
Judge of the District Court.

Dated this 29th day of February, 1912.

(Endorsed:) No. 1685. U. S. District Court, Ninth Circuit, Southern District of California. Home Telephone & Telegraph Company, a corporation, Complainant, vs. City of Los Angeles, et al., Defendants. Stipulation and Order. Filed February 29, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Gibson, Dunn & Crutcher, Los Angeles, Cal., Solicitors for Complainant.

59 In the District Court of the United States in and for the Southern District of California, Southern Division. January, 1912, Term.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant and Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXANDER, Mayor of the City of Los Angeles; The Council of the City of Los Angeles and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles; Lewis R. Works, Martin Bekins and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants and Appellees.

Order that Amended Bill of Complaint Stand as Filed.

This cause coming on regularly at this term, and complainant and defendants being represented in Court by their respective counsel and solicitors, and both sides stipulating therefor in open court.

Now therefore, it is ordered that the amended bill of complaint, as amended by the amendments thereto, stand as such amended bill of complaint, and as filed in the above entitled
60 cause.

Done in open court this 18th day of March, A. D. 1912.

OLIN WELLBORN,
Judge of the District Court of the United States in and for the Southern District of California, Southern Division.

Orig. No. 1685. U. S. District Court Ninth Circuit, Southern District of California, Southern Division, In Equity. Home Telephone & Telegraph Company, a corporation, Complainant and Appellant, vs. City of Los Angeles, a municipal corp., et al., Defendants and Appellees. Order that amended Bill of Complaint stand as filed. Filed Mar. 18 1912 Wm. M. Van Dyke, Clerk By Chas. N. Williams, Deputy Clerk. Gibson, Dunn & Crutcher, Los Angeles, Cal. Att'ys for Complainant and Appellant.

61 At a stated term, to wit: the January Term, A. D., 1912, of the District Court of the United States, for the Southern District of California, Southern Division, held at the Court, in the City of Los Angeles, on Monday, the eighteenth day of March, in the year of our Lord one thousand nine hundred and twelve:

Present: —— ——.

C. C. No. 1685.

HOME TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
THE CITY OF LOS ANGELES et al., Defendants.

This cause coming on this day to be heard on defendants' plea to complainant's amended bill of complaint; Wm. A. Barnhill, Esq., appearing as counsel for complainant; Geo. E. Cryer, Esq., appearing as counsel for defendants; it is now, on motion and by consent, ordered that the amended bill of complaint as amended stand as the amended bill of complaint herein; and said plea of defendant to complainant's amended bill of complaint having thereupon been submitted to the court for its consideration and decision; it is now by the court ordered that said plea to the amended bill of complaint be, and the same hereby is sustained; it is further ordered that complainant's said amended bill of complaint be dismissed, and thereupon a decree accordingly, dismissing said amended bill of complaint, is signed in open court and directed to be entered.

(Endorsed:) C. C. No. 1685. United States District Court, Southern District of California, Southern Division. Home Telephone & Telegraph Company, Complainant, vs. The City of Los Angeles, et al., Defendants. Copy of Order Sustaining Plea to Amended Bill of Complaint. Filed Mar. 18, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

62 In the District Court of the United States in and for the Southern District of California, Southern Division. January, 1912, Term.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXANDER, Mayor of the City of Los Angeles; The Council of the City of Los Angeles and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles; Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants.

Decree Dismissing Amended Bill.

This cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof—

It is ordered, adjudged and decreed that the amended bill of complaint, filed in the above entitled cause by complainant, be, and the same is, hereby dismissed, for want of jurisdiction in this court, with costs to be paid by complainant to defendants, and said costs to be taxed.

And it is further ordered that the reasons and opinion in writing, heretofore rendered and filed in the above entitled cause,
63 in ruling upon the motion for an injunction pendente lite, and the demurrer of the defendants, be, and the same are, hereby adopted and given as the reasons and opinion for this decree.

Done in open court this 18th day of March, 1912.

OLIN WELLBORN,
Judge of the District Court of the United States in and for the Southern District of California, Southern Division.

Costs taxed at $—.
Decree entered and recorded March 18th 1912.

WM. M. VAN DYKE, *Clerk*,
By CHAS. N. WILLIAMS,
Deputy Clerk.

(Endorsed:) Copy No. 1685. U. S. District Court Ninth Circuit Southern District of California Southern Division. In Equity. Home Telephone & Telegraph Co., a corporation, Complainant, vs.

City of Los Angeles, a municipal corporation, et al., Defendants. Decree Dismissing Amended Bill. Filed Mar. 18, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Gibson, Dunn & Crutcher Los Angeles, Cal., Att'ys for Complainant.

64 In the District Court of the United States for the Southern District of California, Southern Division.

C. C. No. 1685.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant,

vs.

THE CITY OF LOS ANGELES et al., Defendants.

Conclusions of the Court on Motion for a Temporary Injunction.

The main, if not only, question on this hearing relates to the meaning and effect of the decisions hereinafter cited of the Circuit Court of Appeals of this Circuit.

With great deference to the learned judge, who wrote the opinion in San Francisco Gas & Electric Co. vs. City and County of San Francisco, et al., 189 Fed. 943, I am unable to adopt his interpretation of Seattle Electric Company vs. Seattle R. & S. Ry. Co., 185 Fed. 365; on the contrary, the latter case, it seems to me, holds directly, that, where an ordinance of a city is prohibited by the constitution of the state, that ordinance for the purpose of federal jurisdiction, is not state action.

65 The City of Seattle had general power to grant franchises for street railways. This is not expressly stated in the bill, but it must be true, otherwise the complainant itself would have had no standing in court, as the rights it sought to protect depended upon a franchise granted by the same municipality. Therefore the ordinance complained of was not ultra vires, but simply an improper or illegal exercise of general power, and the Court held squarely, that said ordinance could not be considered State action, because it was prohibited by the State constitution.

A petition for rehearing was filed, in which, referring to the authorities on which the court based its decision, it was said:

"An examination of these authorities shows that the rule under consideration in all of them is this only: That the Circuit Court has no jurisdiction where the acts against which relief is sought are acts 'of state officers done without authority of, or contrary to, state laws,' or the threatened action is under 'an ordinance to which the state has not in any form given or attempted to give the force of law.' The case of Barney vs. City of New York, supra, was a case of the first kind. The case of Hamilton Gas Light Co. vs. Hamilton City, supra, was a case of the second kind. The cases from which the statement contained in the Encyclopedia above cited is drawn, and which are cited in a foot note in support of the contention, are all of the one character or the other. In no one of them was the

point involved or decided that because the action in question was in violation of the state constitution it was therefore not the act of the state and the protection of the fourteenth amendment to the United States constitution accordingly was not to be invoked against it."

66 Representatives of the Spring Valley Water Company of San Francisco, appearing as friends of the court, said:

"The public attention already given to this portion of the opinion (portion above quoted) is sufficient evidence of the interpretation likely, at any rate, at first glance, to be put upon it. It had been generally declared that the principle thus laid down necessitates the dismissal of actions instituted by public service corporations in the United States Circuit Court to enjoin the collection of rates fixed by public authorities, but claimed to be confiscatory. It seems to us that the opinion in its present form is susceptible of this construction."

The petition for rehearing was denied by the Court.

The construction placed upon the Seattle case by the periodicals referred to in San Francisco G. & E. Co., vs. City and County of San Francisco, supra, namely; 23 Green Bag 123, and 4 Lawyer & Banker 132, accord with the conclusion which I have above announced.

Furthermore a like question was subsequently before the Circuit Court of Appeals of the Circuit in City and County of San Francisco, vs. United Railroads of San Francisco, 190 Fed. 507, advance sheets, and there the court said:

"In that case" (the Seattle case) "the ordinance which was complained of and which it was said would operate to deprive the complainant of its property without due process of law, was alleged in the bill to have been granted illegally and without right to be 'without authority in law, and null and void and of no force and effect.' We held, following the cases above cited, that, taking these averments to be true, the ordinance complained of was not the

67 act of the state and that there was no federal question involved. When it comes to the question whether the ordinance of a municipality is or is not legislation by the state, there can be no difference between an ordinance which has been enacted ultra vires and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance. In neither case is the ordinance state action for in both cases it is void under the state law. Whether or not the ordinances complained of here would in fact, if carried out, have the effect to impair the obligation of the appellee's contract, we do not undertake to decide. What we hold is that the averments of the bill itself exclude the case from the cognizance of the Federal Court as a case arising under the constitution of the United States by alleging that the very ordinances which the appellees relied upon as constituting a violation of its contract have been enacted in violation of the positive law of the state."

It is true that the bill in the present case alleges, that, if the ordinance complained of "is enforced, and your complainant thereby

prevented from charging and receiving higher rates than the rates fixed by said ordinance, the State of California will thereby deprive your complainant of its property without due process of law," etc. This charge, however, that the ordinance complained of is state action, is but a legal conclusion, while the facts alleged are, that the ordinance, if confiscatory, as shown by the bill, is directly prohibited by the Constitution of the State, which, in article 1, section 13, expressly provides, among other things:

No person shall * * * be deprived of life, liberty or property without due process of law."

68 Thus, the case at bar comes within the rulings of the Circuit Court of Appeals in the Seattle and San Francisco cases, and is precisely covered by the conclusions of the court in the latter case as follows:

"What we hold is that the averments of the bill itself exclude the case from the cognizance of the Federal Court as a case arising under the constitution of the United States by alleging that the very ordinances which the appellees relied upon as constituting a violation of its contracts have been enacted in violation of the positive law of the state."

I know of no case where the Supreme Court of the United States has held, that an ordinance of a city manifestly in violation of an express provision of the state constitution is action by the State. It is true, that, in Des Moines City Railway Co. vs. City of Des Moines, 151 Fed. 854, the trial court so held, but, on appeal, the Supreme Court, without making any reference to the views of the trial court, reversed its decision on another ground. (214 U. S. 179.)

In Raymond vs. Chicago Traction Company, 207 U. S. 20, the act complained of was that of the State Board of Equalization which was "one of the instrumentalities provided by the State for the purpose of raising the public revenue by way of taxation."

In Michigan Central R. Co. vs. Powers, 201 U. S. 245, and in Manigault vs. S. M. Ward Company, 123 Fed. 127, affirmed in 199 U. S. 473, the acts complained of were statutes enacted by the legislatures of the States.

Said agencies, the Board of Equalization and the State legislatures, are distinguishable from the municipal body, which

69 does not act in the name of the state, and is not created for general state purposes, but purely local needs, and, while under some circumstances the act of the latter may be considered the act of the State, it may well be said, that its ordinance, obviously in violation of a positive law of the State is not the act of the State.

Following the decisions of the Circuit Court of Appeals of this Circuit in the Seattle and San Francisco cases, as above construed, I hold, that the ordinance complained of in the case at bar is not the act of the state, and accordingly the application for a temporary injunction will be denied, for lack of Federal jurisdiction.

OLIN WELLBORN, *Judge.*

(Endorsed:) C. C. No. 1685. U. S. District Court, Southern District of California, Southern Division. Home Telephone & Tele-

graph Co. vs. The City of Los Angeles, et al. Conclusions of the Court on motion for a temporary injunction. Filed Feb. 13, 1912. Wm. M. Van Dyke, Clerk, by C. E. Scott, Deputy Clerk.

70 In the District Court of the United States in and for the Southern District of California, Southern Division, January, 1912, Term.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant and Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXANDER, Mayor of the City of Los Angeles; The Council of the City of Los Angeles and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants and Appellees.

Statement of Facts.

This suit was brought to restrain the enforcement of an ordinance attached to the amended bill of complaint as Exhibit "B", and hereinafter fully set forth.

The allegations of the amended bill are substantially as follows:

That the complainant is a corporation of the State of California, with its principal place of business in the City of Los Angeles, in said State, and is the owner of, and in possession of, and operating, a telephone system within the City of Los Angeles, under a

71 franchise from the said city, for the term of fifty years from the 8th day of February, 1902.

That this franchise is not an exclusive franchise, and there has been and now is in operation, a competing telephone system within the City of Los Angeles, owned and controlled by the Pacific Telephone & Telegraph Company, a corporation of California.

That the City of Los Angeles is a municipal corporation, duly incorporated under the laws of California, and situated in the County of Los Angeles, in the Southern Division of the Southern District of the State of California.

The capacity in which the remaining defendants, besides the City of Los Angeles, are sued, is then set forth in the usual form.

That the Constitution of the State of California permits any city containing a population of more than 3500 inhabitants, to frame a charter for its own government. That after its adoption by the electors of said city, at an election held for that purpose, the said charter should be submitted to the legislature of said state, for its approval

or rejection as a whole, without power of alteration or amendment, and if approved by the majority vote of the members elected to each house of the legislature, it shall become the charter of such city, and the organic law thereof, and supersede any existing charter.

That the charter so ratified may be amended by amendments adopted by the electors of such city, and approved by the legislature in the same manner. That it is further provided in the said constitution, that cities and towns in the state of California, and all such charters, except in municipal affairs, shall be subject to and controlled by general laws.

That under said provisions the electors of the city of Los Angeles, said city then having a population exceeding the population required by said provisions, duly adopted a charter for said city, which
72 charter was duly approved by the legislature of said state on the 31st day of January, 1889. That said charter was duly amended, and said amendments duly approved by the legislature of the State of California, as follows, to-wit; January 23, 1903, and a further amendment February 16, 1905, and a further amendment February 19, 1907, and a further amendment March 12, 1909, and a further amendment March 25, 1911. That said charter and said amendments were duly published as a part of the Statutes of the State of California, for the years hereinbefore mentioned, respectively.

That reference is made to said charter and said amendments, and said charter and said amendments made a part of the bill of complaint by reference. That in and by the provisions of the said charter of the City of Los Angeles, as the same was amended on or about the 25th day of March, 1911, and thereafter in force and effect, the State of California has delegated to the City of Los Angeles the power to fix and determine the rates or compensation to be collected for telephones and telephone service and connections, and to prescribe the character and quality of any public utility service.

That said charter specifically provides that the Board of Public Utilities of the City of Los Angeles shall have the power to fix, subject to approval, change, or modification by the Council of the said city, as therein and hereinafter stated, the rates to be charged and collected for such telephone service in the said city.

That said rates are to be fixed by resolution of said Board. That said charter as amended as aforesaid, further provides that, after the publication of such resolution of the Board of Public Utilities, any person or corporation affected by such rates may file objections thereto, and thereupon the council of the City of Los Angeles may order a rehearing of such rates, and after such rehearing shall have power to finally fix such rates by approving, changing, or
73 modifying the same by ordinance adopted by a two-thirds vote of said Counsil.

That said charter, as amended, further provides that all rates to which no objections are filed shall be deemed to be finally fixed by said Board of Public Utilities.

That on or about the 13th day of June, 1911, under the aforesaid provisions, the said Board of Public Utilities adopted a resolution

purporting to fix the rates to be charged and collected by complainant and its competitor, the Pacific Telephone & Telegraph Company, a corporation, for telephones, telephon- service and telephone connections in the City of Los Angeles, during the year commencing July 1, 1911, and ending June 30, 1912.

That thereafter objections to the rates so fixed by said resolution were duly filed, and the Council of the City of Los Angeles ordered a rehearing.

That after such rehearing on the 28th day of July, 1911, said council, by a two-thirds vote, passed an ordinance purporting to finally fix the rates to be charged and collected by complainant for telephones, telephone service and telephone connections in the City of Los Angeles during the year commencing July 1, 1911, and ending June 30th, 1912.

That this ordinance was approved by the Mayor of said city on said date, and published as required by law.

That said ordinance has not been repealed nor amended, a copy of which is attached to the amended bill of complaint as Exhibit "B", and made a part of said amended bill.

That the schedule of rates fixed by said ordinance was much lower than the rates prescribed by said resolution of the Board of Public Utilities, and was wholly unreasonable, inadequate and confiscatory.

That in and by said charter of the City of Los Angeles, it is further provided that said Board of Public Utilities make thorough investigation of the affairs of all persons or corporations
74 operating telephone systems (and other public utilities) in said city, and compile such data as may be necessary to determine the proper charges for services furnished by said public utilities.

That such data shall include a valuation of the physical properties of such public utilities.

That said Board shall have the right to examine all of the properties and records of such public utilities.

That prior to the adoption of the said resolution by the said Board of Public Utilities, there was submitted to said Board an annual statement, setting forth an estimate of the value of the physical properties of complainant, exclusive of working capital, comprising, its telephone system in the City of Los Angeles on the 31st day of December, 1910.

That said statement contained also the receipts and expenditures of complainant, in the business of maintaining and operating said telephone system, for the calendar year 1910.

That the total value of said physical properties as so estimated at that time, was the sum of $5,764,545.59.

That prior to the adoption of the said resolution, said Board, by its own members, and by other engineers and experts employed by it, made due inquiry into the property and affairs of complainant and held various hearings at which evidence concerning the said matters was received, and thereafter said Board made its findings and report upon said matters, and thereafter adopted the resolution prescri- g the rates herein referred to.

That complainant, finding itself compelled to seek relief through judicial proceedings, against the unjust and confiscatory rates prescribed by the ordinance of July 28, 1911, herein referred to, since the passage of the ordinance has caused a wholly new inventory and appraisement of its properties to be made.

75 That this inventory and appraisement is based upon a careful and detailed examination and investigation of all parts of the properties and plant of complainant, and of the present value thereof, except such parts as are exhibited in detail by existing records.

That every endeavor has been made to make such inventory and appraisement complete and accurate, and for this purpose complainant has delayed the filing of its original bill of complaint.

That the making of such a complete and accurate inventory and appraisement requires considerable time and a large expenditure, and that complainant had not, for some years prior to the adoption of the said ordinance, felt justified in incurring the said expense.

That said inventory and appraisement was finally completed in November, 1911, and from it complainant ascertained that the estimate of the total value of its properties, on December 31, 1910, contained in the statement and report furnished to the Board of Public Utilities as aforesaid, was considerably less than the actual value thereof on that date. That said inventory and appraisement gives the valuation, as accurately as possible, of complainant's physical properties at the close of business on the 30th day of June, 1911.

A schedule of the values of the different headings of complainant's physical properties is then set forth, showing a total valuation of $6,926,457.55.

That said summary and table of values does not contain any estimate of, or allowance for, the value of complainant's franchise, nor the value of complainant's telephone business and telephone system as a going concern, nor the value of the good will of said business or system, nor any value of, or allowance for, working capital.

That the character of the business of complainant is such
76 that it is not possible to pay all the expenses and charges of operation and maintenance, at the times when it is necessary or advantageous to pay the same, out of the current receipts and the earnings of the said business.

That for this reason it is necessary for complainant to have invested a considerable amount of money as working capital over and above the cost and value of all its other properties, including supplies and stores on hand.

That complainant is justly entitled to a reasonable return on its intangible assets as hereinbefore named, as well as upon the value of its physical properties.

That the earnings of the business of complainant, under the schedule of rates fixed by the said ordinance of July 28, 1911, will afford a wholly inadequate return upon the value of complainant's physical properties, and that said rates are fixed unreasonably low and confiscatory and without regard to the amount or value of said intangible assets and working capital.

That complainant owns and operates a small amount of telephone equipment outside of and in the territory adjacent to said city of Los Angeles.

That the total gross earnings of complainant's said telephone business, both inside and outside of the City of Los Angeles during the year commencing July 1, 1910, was the sum of $1,220,177.55.

That the total gross earnings derived from the operation of complainant's telephone system inside said city, was the sum of $1,192,622.89.

A particular statement of the last said gross earnings, showing the several sources, is then set forth showing the total amount last above named.

That said complainant's telephone system is nearly all of the type known as automatic, and the major portion in value of
77 the physical properties of complainant's said system, consists of electrical and mechanical appliances and equipment, manufactured and adapted only for use in the operation of a telephone system.

That these are subject to more or less deterioration in quality or condition, and depreciation in value, on account of age and length of service.

That the progress of invention and improvements in the art of designing and constructing such telephone appliances and equipment has been very rapid in the past, and there is every reason to anticipate that such will be the case in the future.

That the population of the City of Los Angeles in recent years has increased and spread over new territory very rapidly.

That the causes of such rapid increase and spread of population still exist, and will undoubtedly continue to exist in the future, and additional causes thereof are likely to develop.

That by reason thereof, the rate of increase and spread of population in the future will be greater rather than less than in the past.

That the aggregate number of patrons or subscribers of complainant's said telephone system has likewise steadily and rapidly increased, and the distribution thereof, in the territory served by complainant, greatly changed during the same time.

That such conditions will continue and accelerate, rather than decrease, in the future.

That by reason of these things it has been found necessary in the past, and will be found necessary in the future, to abandon and discontinue the use of a large amount of appliances and equipment of great value, long before the period of natural usefulness thereof has been realized.

That the adoption and enforcement of police regulation by municipal and other public authorities, from time to time, have
78 caused in the past, and will cause in the future, the abandonment and total or partial loss of much valuable equipment and structures.

That these expenditures and losses are commonly referred to as "depreciation", or "depreciation and obsolescence". That they are

unavoidable in the conduct of such a telephone system as that of your complainant.

That in order to conduct said telephone system, it is necessary to make replacements and alterations rendered necessary by said causes, whenever occasion therefor arises, and it is impossible to determine in advance when expenditures for such alterations or replacements will be required.

That experience has shown that the average annual amount of the losses due to "depreciation and obsolescence", is not less than seven per cent in the aggregate of all the physical properties comprised in such telephone system, other than land and current supplies and materials.

That unless an allowance equal to said annual amount of the losses from depreciation and obsolescence is provided by the earnings of complainant, over and above a reasonably annual profit or income upon the value of the properties used in rendering such service, the burden of such losses must fall upon the operator or owner of such system.

That if the rates charged and received for such services, are allowed to be fixed by authority of the state, at a standard which does not so provide an adequate allowance for such losses, the operator or owner of such system is thereby deprived of his property without due process of law, and denied the equal protection of the laws.

That the actual and necessary current expenses of complainant's said telephone business in the City of Los Angeles, during the year commencing July 1, 1910, together with the average an-
79 nual allowance necessary to be provided on account of losses due to depreciation and obsolescence, amounted to the aggregate sum of $1,153,849.69. Then is set out a particular statement of these expenses.

That the total current expenses of the business of complainant's said telephone system outside of said city during said year, but not including any allowance for depreciation or obsolescence, amounted to the sum of $13,056.82.

That the net returns of complainant's said telephone system in the City of Los Angeles, during said year commencing July 1, 1910, amounted to only .5597 of one per cent upon the value of the aforesaid physical properties comprised in complainant's said telephone system, and necessarily used in the operation thereof during said year.

That the rates charged and received by, or for, said services, during the year commencing July 1, 1910, was substantially the same as the rates attempted to be fixed by said ordinance of July 28, 1911, for the year commencing July 1, 1911.

That the rates fixed for the year commencing July 1, 1910, were so fixed by an ordinance adopted by the council of the City of Los Angeles against the protest of your complainant, and notwithstanding the Board of Public Utilities recommended to said Council the adoption of a materially higher schedule of rates.

That complainant refrained from seeking relief by judicial proceedings, from the rates fixed by said council for said year commenc-

ing July 1, 1910, in order to avoid vexatious litigation and the loss of the good will of the public, and in order that the precise effect thereof upon the net returns of the business of complainant might be determined by actual experience, and in the hope that a more just and reasonable schedule of rates would be voluntarily fixed by said council for the year beginning July 1, 1911 and succeeding years.

80 That said council's action in fixing the rates beginning July 1, 1911, was without receiving or seeking any further evidence concerning the value of complainant's properties, or the actual returns of complainant's business, during the year commencing July 1, 1910, or of the rates prescribed for similar telephone services rendered under similar conditions in other cities of the United States, and that said Council set aside the action of the Board of Public Utilities without any just cause or reason therefor.

The amended bill then alleges a number of causes and reasons why the percentage of net returns to the complainant, from the business of its said telephone system in the City of Los Angeles, during the year commencing July 1, 1911, upon the value of the physical properties necessarily used in the operation of said system, will be less, if complainant is compelled to charge and collect the rates attempted to be fixed by the ordinance of such net returns which were collected during the year commencing July 1, 1910.

The amended bill than alleges that said ordinance of July 28, 1911, makes it a misdemeanor, punishable by fine or imprisonment, or both, for complainant, or any officer or agent thereof, to demand, charge, collect, or receive, any rates in excess of the rates purporting to be prescribed by said ordinance, and that if complainant violates its said ordinance in any of these particulars, complainant and its officers will be subjected to numerous criminal prosecutions under said ordinance, and numerous suits by individual patrons or subscribers, seeking to compel complainant to furnish telephone services at the rates purporting to be prescribed by said ordinance of July 28, 1911.

The amended bill than alleges that complainant has upwards of thirty thousand patrons or subscribers to whom services are

81 rendered from month to month, and that although complainant does not accept payment for services of said telephone system at the inadequate rates prescribed by said ordinance, except under protest, it expressly reserves the right to collect such additional rates as may be just and legal.

The amended bill prays for an adjudication that the said ordinance of July 28, 1911, is void because in contravention of the Constitution of the United States, in that, if said ordinance is enforced, the State of California will deprive complainant of its property without due process of law, and will deny to complainant the equal protection of the laws.

Also for an injunction pendente lite to restrain the enforcement of said ordinance, and that said injunction be perpetual on the final hearing of this cause.

It is then prayed that the usual process issue, and that the injunc-

tions herein mentioned be applied to all persons who may seek to enforce said ordinance.

The amended bill is verified by the President of complainant, in the usual manner, but answer under oath is expressly waived.

82 *Ordinance No.* 23,122.

(New Series.)

An Ordinance Finally Fixing the Rates to be Charged and Collected by the Home Telephone and Telegraph Company, a Corporation, for Telephones, Telephone Service, and Telephone Connections in the City of Los Angeles, During the Year Commencing July 1, 1911, and Ending June 30, 1912, and Changing and Modifying the Rates for Such Service as Fixed by the Board of Public Utilities of the City of Los Angeles.

Whereas, the Board of Public Utilities of the City of Los Angeles, did, by Rate Resolution No. 3, entitled, "A Resolution of the Board of Public Utilities of the City of Los Angeles, fixing the rates to be charged and collected for telephones, teelphone service and telephone connections in the City of Los Angeles, during the year commencing July 1, 1911 and ending June 30, 1912," adopted by said Board on the 13th day of June, 1911, fix the rates to be charged and collected for telephones, telephone service and telephone connections to the City of Los Angeles, or to the inhabitants thereof, for the year commencing June 1, 1911 and ending June 30, 1912; and,

Whereas, immediately upon the adoption of said resolution by said Board of Public Utilities, a copy of said resolution certified by the Secretary of said Board, was filed in the office of the City Clerk, and said City Clerk did present said resolution to the Council at its next regular meeting and did cause said resolution to be published for five days in the Los Angeles Daily Journal, a daily newspaper printed and published and circulated in said city, as required by the charter of said city; and,

Whereas, within fifteen (15) days after the expiration of the publication of said resolution, as aforesaid certain persons, firms, and corporations interested in or affected by such rates did file objections thereto with the City Clerk, specifying the grounds of such objections and did petition the counsel for a rehearing of such rates; and,

83 Whereas, the City Clerk did lay all such objections before the Council at its next regular meeting after the expiration of the time for filing such objections, to-wit, at the regular meeting of said Council held on the 11th day of July, 1911, and the Council did thereupon proceed to consider such objections and did, by a vote of not less than two-thirds of its members, order a rehearing of said rates, and did fix a time for considering such rates and hearing and passing upon the objections thereto, to-wit, the 17th day of July, 1911, which day last aforesaid was not less than three days nor more than ten days after the rehearing of such rates had been ordered; and,

Whereas, after such rehearing of such rates had been ordered by the Council, as aforesaid, the City Clerk did on the 14th day of July, 1911, notify each person, firm or corporation, by or on whose behalf such objections had been made and did notify each person, firm or corporation engaged in the business of furnishing telephones, telephone service and telephone connections to the City of Los Angeles, or to the inhabitants thereof, and whose rates were to be considered and finally fixed, of the time and place appointed for such rehearing, by depositing in the Post Office of the City of Los Angeles, postage prepaid, a notice addressed to each such person, firm or corporation specifying in such notice the time and place of such rehearing and did file a similar notice forthwith in the office of the Board of Public Utilities; and,

Whereas, such rehearing was ordered to be held and was held at the meeting of the Council on the said 17th day of July, 1911, and was thereafter continued, conducted and held by and before said Council until such rehearing was completed, and at such rehearing evidence, both oral and documentary, was submitted to and considered by the Council in relation to and in support of such rates and in support of such objections and in relation to and in support of the rates as fixed by this ordinance; and,

84 Whereas, after hearing such evidence and considering such rates and the objections thereto, the Council did order the said rates as fixed by said Board of Public Utilities to be changed and modified, and that the rates to be charged and collected for such service by the Home Telephone and Telegraph Company, a corporation, be finally fixed as hereinafter provided;

Now, therefore, The Mayor and Council of the City of Los Angeles do ordain as follows:

SECTION 1. That the rates to be charged and collected for telephones, telephone service and telephone connections in the City of Los Angeles, furnished to the City of Los Angeles, or to the inhabitants thereof, by the Home Telephone and Telegraph Company, a corporation for the year commencing July 1, 1911, and ending June 30, 1912 as fixed by the Board of Public Utilities by Rate Resolution No. 3, as aforesaid, be and the same are hereby changed and modified and the rates to be charged and collected for telephones, telephone service and telephone connections in the City of Los Angles, furnished to the City of Los Angeles or to the inhabitants thereof, by the Home Telephone and Telegraph Company, a corporation, for the year commencing July 1, 1911 and ending June 30, 1912, are hereby finally fixed as follows:

1. For each telephone installed and maintained in any business office, or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $5.00 per month.

2. For each telephone installed and maintained in any business office or premises connected with the central exchange by a two-party line circuit, with unlimited service, $3.50 per month.

3. For each sending telephone or sending trunk line installed or maintained in any business office or premises, connected with the

central exchange by an independent or individual circuit,
85 with unlimited service, $4.00 per month. For the purpose of this ordinance a sending telephone or a sending trunk line is defined to be one from which connection may be obtained with the central exchange, and through such exchange with other telephones, and which cannot be called by the central exchange for the purpose of communication with other telephones.

4. For each receiving telephone or receiving trunk line installed and maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $3.00 per month. For the purposes of this ordinance a receiving telephone or receiving trunk line is defined to be one from which connection cannot be obtained with the central exchange unless such telephone is called by such central exchange.

5. For each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $2.00 per month.

6. For each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange by a two-party line circuit, with unlimited service, $1.75 per month.

7. For each telephone installed and maintained in any house or place other than a business office or premises connected with the central exchange by a four party line circuit, with unlimited service, $1.50 per month.

8. For each suburban telephone installed and maintained in any business office or premises, or in any residence, house or place, connected with the central exchange by a party line circuit having not over ten stations, with unlimited service, $2.50 per month. For the purposes of this ordinance a suburban telephone is defined as a telephone on a party line circuit having ten or less telephones and located within the city limits of Los Angeles, and between the center lines of Manchester Avenue on the north and Ballona Avenue (Howard Townsite) on the south.

86 9. For each telephone installed and maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with service limited to one hundred calls per month, $5.00 per month; and two cents additional for each call in excess of one hundred in any month.

10. For each telephone installed and maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with service limited to sixty calls per month, $4.00 per month, and three cents additional for each call in excess of sixty in any month.

11. For each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange, by an independent or individual circuit, with service limited to fifty calls per month, $2.00 per month, and two cents additional for each call in excess of fifty in any month.

12. For each telephone provided with a coin or nickle-in-the-slot

prepayment device, installed and maintained in any business office or premises, or public place and connected with the central exchange by an independent or individual circuit, with service limited to three calls per day, fifteen cents per day, and five cents additional for each call in excess of three in any day.

Of the five cents additional for each call in excess of three in any day, the telephone company shall retain three cents and the firm, corporation or person subscribing to the service, two cents.

13. For each extension telephone, $1.00 per month.

14. For each extension bell, 25 cents per month.

15. For each private branch exchange switchboard located in a business office or premises with unlimited service, $1.00 per month, for two-way trunk lines, connecting such private branch ex-
87 change switchboard with the central exchange, with unlimited service, $8.00 per month for one trunk line and $6.00 per month for each additional trunk line; for each telephone station in such private exchange, $1.00 per month.

For each private branch exchange switchboard located in any hotel, apartment house or lodging house, with unlimited service, $1.00 per month; for two way trunk lines connecting such private branch exchange switchboard with the central exchange, with unlimited service, $5.00 per month for one trunk line and $4.00 per month for each additional trunk line; for each wall telephone station located in any room maintained for the accommodation of a guest or guests and connected with any such private branch exchange in any such hotel, apartment house or lodging house twenty-five cents per month.

For the purposes of this ordinance a private branch exchange is defined to be a private telephone system with a switchboard for connecting the individual private telephone lines with each other or with the central exchange, but wherein the private telephone stations are not provided with individual facilities for establishing connections with each other or with the central exchange.

16. For each two-way unlimited service trunk line connecting and intercommunicating system, located in any business office or premises, with the central exchange, $6.00 per month, for each telephone station, including the receiving station, in such intercommunicating system with unlimited service, $1.25 per month.

For the purpose of this ordinance an intercommunicating system is defined to be a private telephone system wherein each station is provided with individual facilities for establishing connections with the trunk lines leading to the central exchange and with the individual lines of the other stations in the same private telephone system.

88 17. For each two-way unlimited service trunk line connecting an intercommunicating system, located in any house or place other than a business office or premises, with the central exchange, including the receiving station, $4.00 per month; for each telephone station, other than the receiving station, in such intercommunicating system, with unlimited service seventy-five cents per month.

18. For each private branch exchange switchboard, located in a business office or premises with limited service, $1.00 per month; for each two-way trunk line connecting such private branch exchange switchboard with the central exchange, with service limited to one hundred calls per month for each trunk, $4.00 per month and two cents additional for each call in excess of one hundred calls per trunk per month; for each telephone in such limited service private branch exchange, seventy-five cents per month.

19. For each private branch exchange switchboard, located in any hotel, apartment house or lodging house for the accommodation of guests, with limited service, $1.00 per month; for each two way trunk line connecting such private branch exchange with service limited to one hundred calls for each trunk per month; $4.00 per month and two and one half cents additional for each call in excess of one hundred calls per trunk per month; for each wall telephone station in such limited service private branch exchange, twenty-five cents per month.

20. For each two-way trunk line connecting an intercommunicating system located in any business office or premises with the central exchange with service limited to one hundred calls per trunk per month, $4.00 per month, and two cents additional for each call in excess of one hundred calls per trunk per month; for each telephone, including the receiving station in such limited service intercommunicating system, $1.00 per month.

89 21. Where the owner or proprietor of any hotel, apartment house or lodging house shall enter into a contract for ten or more unlimited service telephones connected with the central exchange by two-party line circuits as provided for in paragraph 6 of this section and for use in the respective rooms or apartments in such hotel, apartment house or lodging house, a reduction of twenty five cents per month per telephone from the rates prescribed in paragraph 6 of this section shall be allowed. When special facilities are provided in connection with ten or more one-party or two-party telephones in any such hotel, apartment house or lodging house, whereby direct telephone communication may be had between the various rooms or apartments and the entrance or janitor's quarters of such hotel, apartment house or lodging house, an additional charge of twenty-five cents per telephone per month shall be made.

22. Unless otherwise in this section specifically provided, the rates fixed by this section shall apply to wall telephones, provided that an additional charge of fifty cents per month shall be made for each portable telephone installed and maintained in any business office or premises, and an additional charge of twenty-five cents per month shall be made for each portable telephone installed and maintained in any house or place other than a business office or premises, and provided further that such additional charge for portable telephones shall not apply to extension telephones or telephone stations on private branch exchanges.

SEC. 2. It shall be unlawful for any person, firm or corporation mentioned in this ordinance, either as principal, agent, employee or otherwise, to charge, demand, collect or receive any rate or compensa-

tion for telephones, telephone service or telephone connections during the year commencing July 1, 1911, and ending June 30, 1912, to the City of Los Angeles or to any inhabitant thereof in excess of the rate fixed by this ordinance.

Sec. 3. It shall be unlawful for any person, firm or corporation mentioned in this ordinance, either as principal, agent, employee, or otherwise, to charge, demand, collect, or receive any rate or compensation for telephones, telephone service or telephone connections supplied during the year commencing July 1, 1911 and ending June 30, 1912, to the City of Los Angeles, or to any inhabitant thereof, less than the rate fixed by this ordinance, unless an application for a reduction in such rate is made by the person, firm or corporation, so supplying such telephones, telephone service, or telephone connections, and the consent of the Board of Public Utilities thereto is obtained, in the manner hereinafter provided. Such application shall be in writing and shall be signed by the person, firm or corporation making the same and shall be filed with the Board of Public Utilities and shall state the rate desired to be established.

Said application shall be considered by said Board of Public Utilities, and if granted, said Board shall make an order which shall specify the changed rate and the date when the same shall become effective. Said order shall be published for five (5) days in a daily newspaper printed, published and circulated in said city before said order takes effect. Upon and after the date so designated in such order the rate stated in such order, made by said Board of Public Utilities, shall be the only lawful rate to be charged, demanded, collected or received by the person, firm or corporation making such application, and upon and after such date it shall be unlawful for such person, firm or corporation or for any agent or employee of such person, firm or corporation, to charge, demand, collect or receive any rate or compensation in excess of the rate so designated in such order; provided, however, that such rate may be thereafter increased by making application for such increase in the same manner as herein provided for the decrease in such rate, but no such rate shall be increased to an amount in excess of the rate established by this ordinance.

No such increase or decrease of any rate or schedule of rates specified in this ordinance shall be effected without the consent in writing first granted by the Board of Public Utilities as herein provided. And no order of the Board of Public Utilities with reference to the decrease or increase of rates as herein provided shall be effective unless such order be first authorized or approved by the council by ordinance.

Sec. 4. It shall be unlawful for any person, firm or corporation mentioned in this ordinance, either as principal, agent, employee or otherwise, to charge, demand, collect or receive from the City of Los Angeles or from any person, firm or corporation therein, any rate or compensation for telephones, telephone service, or telephone connections during the year commencing July 1, 1911 and ending June 30, 1912, greater or less than the rate or compensation charged, de-

manded, collected, or received from any other person, firm or corporation, for the same or equivalent service.

SEC. 5. It shall be unlawful for any person, firm or corporation mentioned in this ordinance which has not, as provided by section 3 of this ordinance, established rates different from those established by this ordinance, or for any officer, agent, collector, or employee of such person, firm or corporation directly or indirectly, by any special rebate, draw-back or other device, or in any manner or form, or by any means, to charge, demand, collect or receive any rate or rates, or payment or compensation or consideration for telephones, telephone service or telephone connections greater or less than or different from the rates fixed by this ordinance.

SEC. 6. Nothing in this ordinance contained shall apply
92 to the furnishing of free telephones, telephone service or telephone connections to the City of Los Angeles pursuant to any ordinance or franchise.

SEC. 7. That any person, firm or corporation mentioned in this ordinance violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than two hundred ($200) dollars, or by imprisonment in the city jail for a period of not more than one hundred (100) days, or by both such fine and imprisonment.

SEC. 8. The City Clerk shall certify to the passage of this ordinance by a unanimous vote and cause the same to be published once in the Los Angeles Daily Journal.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles by the unanimous vote of all the members of said Council present, there being not less than seven members present, at its meeting of July 28, 1911.

LORIN A. HANDLEY,
City Clerk.

Approved this 28th day of July, 1911.

GEO. ALEXANDER, *Mayor.*

93 Thereafter defendants jointly filed a plea to the jurisdiction, setting forth that "the constitution of the state of California provides that no person shall be deprived of liberty or property without due process of law", and claiming that the acts of the Council of the City of Los Angeles, State of California, complained of in the amended bill of complaint, were not "state action" within the meaning of the constitution of the United States, and particularly the Fourteenth Amendment thereto.

The plea was sustained and the decree entered for want of jurisdiction in the federal court.

Dated March 18th, 1912.

(Endorsed:) Orig. No. 1685. U. S. District Court Ninth Circuit Southern District of California, Southern Division. In Equity. Home Telephone & Telegraph Company, a corporation, Complainant

and Appellant, vs. City of Los Angeles, a municipal corp. et al., Defendant and Appellees. Statement of Facts. Filed Mar. 18, 1912. Wm. M. Van Dyke, Clerk, By Chas. N. Williams, Deputy Clerk. Gibson, Dunn & Crutcher, Los Angeles, Cal., Att'ys for Complainant and Appellant.

94 In the District Court of the United States in and for the Southern District of California, Southern Division, January, 1912, Term.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant and Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXANDER, Mayor of the City of Los Angeles; The Council of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles; Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants and Appellees.

Petition for Appeal to the Supreme Court of the United States.

The above named complainant, considering itself aggrieved by the decree entered on March 18th, 1912, in the above entitled cause, dismissing complainant's amended bill of complaint for want of jurisdiction in the Federal Court, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and for the reason that the case involves the construction of the jurisdiction of the District Court of the United States, and prays that this appeal may be allowed, and that a transcript of the record, pro-

95 ceedings and papers upon which said order and decree are made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated March 18th, 1912.

GIBSON, DUNN AND CRUTCHER,
Attorneys for Complainant and Appellant.

(Endorsed:) Orig. No. 1685. U. S. District Court, Ninth Circuit Southern District of California, Southern Division. In Equity. Home Telephone & Telegraph Company, a corporation, Complainant and Appellant, vs. City of Los Angeles, a municipal corp. et al. Defendants and Appellees. Petition for Appeal to the Supreme Court of the United States. Filed Mar. 18, 1912. Wm. M. Van Dyke, Clerk by Chas. N. Williams, Deputy Clerk. Gibson, Dunn & Crutcher, Los Angeles, Cal., Att'ys for Complainant and Appellant.

96 In the District Court of the United States in and for the Southern District of California, Southern Division, January, 1912, Term.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant and Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXANDER, Mayor of the City of Los Angeles; The Council of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles; Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants and Appellees.

Assignment of Errors.

Now on this 18th day of March, A. D. 1912, comes complainant by its solicitors, and says that the decree entered in the above entitled cause on the 18th day of March, A. D. 1912, dismissing the complainant's amended bill of complaint for want of jurisdiction, is erroneous and unjust to complainant, and that the court erred therein.

I.

The court erred in that it did not hold that complainant's amended bill of complaint stated a cause within the jurisdiction of the federal court.

97 II.

The Court erred in that it did not hold that complainant's amended bill of complaint stated a cause within the jurisdiction of the District Court of the United States in and for the Southern District of California, Southern Division.

III.

The Court erred in not retaining jurisdiction of said cause, and trying and determining the same, and entering a decree in the same.

IV.

The Court erred in sustaining the plea of the defendants and each of them.

V.

The Court erred in not granting the injunction pendente lite prayed for in complainant's amended bill of complaint.

VI.

The Court erred in not granting the relief prayed for in complainant's amended bill of complaint.

VII.

The Court erred in not requiring defendants and each of them to answer to complainant's amended bill of complaint.

VIII.

The Court erred in dismissing complainant's amended bill of complaint.

IX.

The Court erred in holding that the acts of the Council of the City of Los Angeles, State of California, complained of in complainant's amended bill of complaint, were not state action.

X.

The Court erred in holding that the acts of the Council of the City of Los Angeles, State of California, complained of in com-
98 plainant's amended bill of complaint, were not state action within the meaning of the Constitution of the United States.

XI.

The Court erred in holding that the acts of the Council of the City of Los Angeles, State of California, complained of in complainant's amended bill of complaint, were not state action within the meaning of the Fourteenth Amendment to the Constitution of the United States.

XII.

The Court erred in holding that the acts complained of in complainant's amended bill of complaint, did not deprive complainant of its property without due process of law, within the meaning of the constitution of the United States.

XIII.

The Court erred in holding that the acts complained of in complainant's amended bill of complaint, did not deny to complainant the equal protection of the laws, within the meaning of the constitution of the United States.

XIV.

The Court erred in holding that the acts complained of in complainant's amended bill of complaint, did not deprive complainant of its property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

XV.

The Court erred in holding that complainant's remedy, if any, was in the Courts of the State of California.

XVI.

The Court erred in holding that the acts of the council of the City of Los Angeles, State of California, as set forth in complainant's amended bill of complaint, were not the acts of the State of California.

99 XVII.

The Court erred in holding that the acts complained of in complainant's amended bill of complaint, if the cause of complaint is true, contravened the constitution of the State of California, which provides that there shall be no deprivation of liberty or property without due process of law, and therefore the remedy, if any, was solely within the jurisdiction of the State Courts and not of the Federal Courts.

XVIII.

The Court erred in holding that it had no jurisdiction to determine whether the acts of the council of the City of Los Angeles, State of California, in determining and fixing telephone rates, in the ordinance of July 28, 1911, attached to complainant's amended bill of complaint as Exhibit "B", under and by virtue of the power in the charter of the City of Los Angeles, and complained of by complainant in its amended bill of complaint, were unreasonable, unjust and confiscatory.

XIX.

The Court erred in holding that it had no jurisdiction to determine whether the acts of the council of the City of Los Angeles, State of California, in determining and fixing telephone rates, in the ordinance of July 28, 1911, attached to complainant's amended bill of complaint as Exhibit "B", under and by virtue of the power in the charter of the City of Los Angeles, and complained of by complainant in its amended bill of complaint, were unreasonable, unjust and confiscatory, within the meaning of the Constitution of the United States, or the Fourteenth Amendment thereto.

Wherefore the said complainant prays that the said decree be reversed, and that the United States District Court, in and for the Southern District of California, Southern Division, be directed to re-

tain said amended bill of complaint, and take jurisdiction of
100 the above entitled cause, and try and decide said cause, or grant the relief prayed for in said amended bill of complaint.

Dated March 18th, 1912.

GIBSON, DUNN AND CRUTCHER,
Solicitors for Complainant.

(Endorsed:) Orig. No. 1685. U. S. District Court, Ninth Circuit Southern District of California, Southern Division. In Equity. Home Telephone & Telegraph Company, a corporation, Complainant and Appellant, vs. City of Los Angeles, a municipal corp. et al., Defendants and Appellees. Assignment of errors. Filed Mar. 18, 1912. Wm. M. Van Dyke, Clerk By Chas. N. Williams, Deputy Clerk. Gibson, Dunn & Crutcher, Los Angeles, Cal., Att'ys for Complainant and Appellant.

101 In the District Court of the United States in and for the Southern District of California, Southern Division, January, 1912, Term.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant and Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXander, Mayor of the City of Los Angeles; The Council of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles; Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants and Appellees.

Order Granting Appeal.

Comes now the complainant, by its counsel and solicitors, and come the defendants by their counsel and solicitors, and appear in open court in the above entitled cause, and said complainant files herein a petition for appeal to the Supreme Court of the United States, from the decree of this court made in said cause on the 18th day of March, 1912, dismissing the amended bill of complaint for want of jurisdiction in the federal court, and said complainant files herein an assignment of errors accompanying said petition for appeal. And complainant also files a bond on appeal, in the sum of One Thousand ($1000.) Dollars, with A. B. Cass and J. S. Torrence as sureties on said bond.

102 It is now hereby ordered by said court that the bond presented in support of said appeal, be, and the same is, hereby

approved, and, it appearing to the court that this said cause and said decree is a case that involves the jurisdiction of the District Court of the United States, and a determination of said jurisdiction, that said appeal to the Supreme Court of the United States, be and the same is hereby granted and allowed, and the Clerk is hereby ordered to certify the record in said cause to the Supreme Court.

Done in open Court this 18th day of March, 1912.

OLIN WELLBORN,
Judge of the District Court of the United States in and for the Southern District of California, Southern Division.

(Endorsed:) Orig. No. 1685 U. S. District Court Ninth Circuit Southern District of California, Southern Division, In Equity. Home Telephone & Telegraph Company, a corporation, Complainant and Appellant, vs. City of Los Angeles, a Municipal Corp. et al. Defendants and Appellees. Order Granting Appeal. Filed Mar. 18 1912 Wm. M. Van Dyke, Clerk By Chas. N. Williams, Deputy Clerk. Gibson, Dunn & Crutcher, Los Angeles, Cal., Att'ys for Complainant and Appellant.

103 In the District Court of the United States in and for the Southern District of California, Southern Division, January, 1912, Term.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant and Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXander, Mayor of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles; Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants and Appellees.

Bond on Appeal.

Know all men by these presents:

That we, Home Telephone & Telegraph Company, a corporation, as principal, and A. B. Case and J. S. Torrence as sureties, are held and firmly bound unto the City of Los Angeles, and to each of the defendants above named, in the full and just sum of One Thousand Dollars, to be paid to said defendants, City of Los Angeles, a municipal corporation, George Alexander, Mayor of the City of Los An-

geles, The Council of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed,
104 John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, members of and constituting the Council of the City of Los Angeles, the Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins and Thomas Foulkes, members of and constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, their certain attorneys, solicitors, or counsel, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 13th day of March, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately, in the District Court of the United States, in and for the Southern District of California, Southern Division, on the 18th day of March, 1912, in a suit, pending in said court, wherein the Home Telephone & Telegraph Company, a corporation, was and is complainant, and the City of Los Angeles, et al., were and are defendants, a decree was rendered against said complainant, Home Telephone & Telegraph Company, a corporation, dismissing the amended bill of complaint of said complainant, for want of jurisdiction, and said complainant having obtained an appeal, and filed a copy thereof in the Clerk's office of the said court, to reverse the decree in the aforesaid suit, which appeal was allowed in open court during the term at which said decree was rendered, and the defendants appearing at the time of the granting of said appeal—

Now, the condition of the above obligation is such that if the said Home Telephone & Telegraph Company, a corporation, shall
105 prosecute its appeal to effect, and answer all damages and costs, if the said complainant fail to make its appeal good, then the above obligation to be void, otherwise to remain in full force and virtue.

Dated March 18th, 1912.

HOME TELEPHONE & TELEGRAPH COMPANY,
By A. B. CASS, *President.*
By E. P. MORPHY, *Secretary.*
A. B. CASS. [SEAL.]
J. S. TORRENCE. [SEAL.]

[CORPORATE SEAL.]

Sealed and delivered in the presence of—

H. L. BRUBAKER.
G. H. BUCKWALTER.

106 STATE OF CALIFORNIA,
County of Los Angeles, ss:

A. B. Cass and J. S. Torrence being each duly sworn each for himself and not one for the other, states as follows:

That he is a property owner in the County of Los Angeles State

of California, and competent to be a surety in the within and foregoing bond on appeal; that he is worth the sum mentioned in the said bond over and above all of his just debts and liabilities and property exempt from execution.

Subscribed and sworn to before me this 13th day of March, 1912.

[SEAL.] F. W. REA,
Notary Public in and for the County of Los Angeles, State of California.

The within and foregoing Bond on Appeal is hereby approved. Done in open court this 18th day of March, 1912.

OLIN WELLBORN,
Judge of the District Court of the United States in and for the Southern District of California, Southern Division.

(Endorsed:) Orig. No. 1685. U. S. District Court, Southern District of California, Southern Division, In Equity. Home Telephone & Telegraph Company, a corporation, Complainant and Appellant vs. City of Los Angeles, a municipal corp. et al. Defendants and Appellees. Bond on Appeal. Filed Mar. 18 1912 Wm. M. Van Dyke, Clerk, By Chas. N. Williams, Deputy Clerk. Gibson Dunn & Crutcher, Los Angeles, Cal. Att'ys for Complainant and Appellant.

107 In the District Court of the United States in and for the Southern District of California, Southern Division, January, 1912, Term.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant and Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXANDER, Mayor of the City of Los Angeles; The Council of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles; Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants and Appellees.

Certificate to Jurisdictional Question.

This cause came on duly to be heard on the amended bill of complaint and plea thereto.

The plea goes to the whole amended bill of complaint and avers that this court ought not to take jurisdiction of this suit for that the said suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of this court for inasmuch as the constitution of the State of California — that no person
108 shall be deprived of liberty or property without due process of law.

Issue was taken directly on the jurisdiction of this Court.

Now therefore it is certified that the question of the jurisdiction of this court upon the grounds heretofore stated, to-wit, whether the acts of the Council of the City of Los Angeles complained of in the amended bill of complaint in fixing telephone rates complained of to be unjust, unreasonable and confiscatory are in violation of the provision of the Constitution of the State of California which provides that there can be no deprivation of liberty or property without due process of law and therefore not state action because forbidden by the Constitution of the State of California; or whether said acts of the City Council complained of are state action within the meaning of the Constitution of the United States and particularly the Fourteenth Amendment thereof, was the issue upon which this court decided the matter, I having found that the said acts of the said council complained of were not state action within the meaning of the Constitution of the United States and particularly within the meaning of the Fourteenth Amendment thereof, and that the remedy of complaint, if any, was in the courts of the State of California, and not in the Federal Court or in this Court, it was the duty of the Court to dismiss the amended bill, which was accordingly done.

And I further certify that it is the only question of law upon the amended bill of complaint and plea thereto, and the pleading and process in the above entitled suit for the decision of the Supreme Court of the United States, and that the certificate was granted at the term, to-wit, January 1912, term, in which the judgment in the case was entered.

Dated March 18, 1912.

OLIN WELLBORN,
Judge of the District Court of the United States in and for the Southern District of California, Southern Division.

109 (Endorsed:) Orig. No. 1685. U. S. District Court, Ninth Circuit, Southern District of California, Southern Division. In Equity. Home Telephone & Telegraph Company, a corporation, Complainant and Appellant, vs. City of Los Angeles, a municipal corp. et al., Defendants and Appellees. Certificate to Jurisdictional Question. Filed Mar. 18, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Gibeon, Dunn & Crutcher, Los Angeles, Cal., Att'ys for Complainant and Appellant.

110 In the District Court of the United States in and for the Southern District of California, Southern Division, January, 1912, Term.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant and Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXander, Mayor of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants and Appellees.

Stipulation.

It is hereby stipulated by respective counsel and solicitors for both parties in the above entitled cause that the clerk in making up the transcript may omit therefrom the following papers and records:

Original Bill of Complaint, Demurrer thereto, Order of the above entitled Court sustaining Demurrer and denying plaintiff's motion for injunction pendente lite, and giving complainant ten (10) days in which to file Amended Complaint, and that an order may be issued accordingly with the permission of the Court.

Dated at Los Angeles, California, March 18th, 1912.

111 GIBSON, DUNN AND CRUTCHER,
Solicitors for Complainant.
JOHN W. SHENK,
Solicitor for Defendants.

Order.

Upon reading and filing the foregoing stipulation in the record in the above entitled cause and good cause shown therefor, it is ordered that the following papers and records in the above entitled cause may be omitted by the Clerk of this Court in making up the transcript on appeal:

Original Bill of Complaint, Demurrer thereto, and Order of Court sustaining Demurrer and denying Plaintiff's motion for injunction pendente lite and giving complainant ten (10) days in which to file amended bill of complaint.

Done in open court this 18th day of March, 1912.

OLIN WELLBORN,
Judge of the District Court of the United States in and for the Southern District of California, Southern Division.

POOR COPY

(Endorsed:) No. 1685. U. S. District Court Ninth Circuit Southern District of California, Southern Division. In Equity. Home Telephone & Telegraph Company, a corporation, Complainant and Appellant vs. City of Los Angeles, a municipal corp. et al., Defendants and Appellees. Stipulation and Order. Filed Mar. 18, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Gibson, Trask, Dunn & Crutcher Los Angeles, Cal. Att'ys for Complainant and Appellant.

112 In the District Court of the United States in and for the Southern District of California, Southern Division, January, 1912, Term.

In Equity.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant and Appellant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXander, Mayor of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; The Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins, and Thomas Woulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants and Appellees.

Præcipe for Appeal Record.

To the Clerk of the above entitled court:

You will please prepare the record in the above entitled cause for appeal from the final decree in said cause dismissing complainant's Bill made and entered in said cause on the 18th day of March, 1912, to the Supreme Court of the United States, and in said record include all proceedings, papers and records of said court subsequent to and beginning with the Amended Bill of Complaint, and more particularly specified as follows:

1. Stipulation substituting defendants.
2. Amended Bill of Complaint.
3. Plea of Defendants.

113 4. Stipulation and Order amending Amended Bill of Complaint.

5. Order that Amended Bill of Complaint stand as filed.
6. Order sustaining Plea to Amended Bill of Complaint.
7. Decree dismissing Bill of Complaint.
8. Conclusions of the Court.
9. Statement of Facts.
10. Petition for Appeal.

11. Assignment of Errors.
12. Order granting Appeal.
13. Bond on Appeal.
14. Certificate to jurisdictional question.
15. Stipulation and order as to Transcript.
16. Præcipe for Appeal Record.
17. Clerk's Certificate to Transcript.

GIBSON, DUNN AND CRUTCHER,
Solicitors for Complainant.

(Endorsed:) No. 1685. United States District Court, Southern District of California, Southern Division. Home Telephone & Telegraph Company, a corporation, Complainant and Appellant, vs. City of Los Angeles, a municipal corporation, et al., Defendants and Appellees. Præcipe for Appeal Record. Filed Apr. 2, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

114 In the District Court of the United States in and for the Southern District of California, Southern Division.

No. 1685.

HOME TELEPHONE & TELEGRAPH COMPANY, a Corporation, Complainant,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; GEORGE ALEXander, Mayor of the City of Los Angeles; The Council of the City of Los Angeles and M. F. Betkouski, J. A. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, Members of and Constituting the Council of the City of Lon Angeles; The Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins, and Thomas Foulkes, Members of and Constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Defendants.

I, William M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify that the above and foregoing one hundred thirteen (113) typewritten pages numbered from 1 to 113, both inclusive, and comprised in one volume, is a full, true, correct and complete transcript and copy of the record, assignments of error and proceedings had in cause No. 1685 in equity in said Court wherein Home Telephone & Telegraph Company, a corporation, is complainant and appellant, and the City of Los Angeles, a municipal corporation, and others, are defendants, and all of the appeal papers except that certain portions of said record are omitted by Stipulation of respective counsel and an Order of the above
115 entitled Court, the omitted portions being the original Bill of Complaint, the defendants' Demurrer thereto, and the

Order of said Court sustaining Demurrer and denying plaintiff's motion for injunction pendente lite and giving complainant ten (10) days in which to file Amended Bill of Complaint, as fully as the same remains on file and on record in my office in the City of Los Angeles, County of Los Angeles, State of California, and that the same excluding said omitted portions of said record as herein stated, constitute the transcript of the Record on Appeal to the Supreme Court of the United States in said cause.

And I do further certify that the cost of the foregoing record is $100 40/100, the amount whereof has been paid to me by the Home Telephone & Telegraph Company, a corporation, the complainant and appellant in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 4th day of April, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States, the one hundred and thirty-sixth.

[Seal of the U. S. District Court, Southern Dist. of California.]

WM. M. VAN DYKE,
Clerk of the District Court of the United States of America in and for the Southern District of California.

Endorsed on cover: File No. 23,160. S. California D. C. U. S. Term No. 1084. Home Telephone & Telegraph Company, appellant, vs. City of Los Angeles et al. Filed April 15th, 1912. File No. 23,160.

IN THE

Supreme Court

OF THE

United States.

Home Telephone & Telegraph Company, a corporation,

Appellant,

vs.

City of Los Angeles, a municipal corporation, George Alexander, Mayor of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, members of and constituting the Council of the City of Los Angeles, the Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins and Thomas Foulkes, members of and constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles,

Appellees.

Notice of Motion to Advance Cause on Calendar.

To the City of Los Angeles, a Municipal Corporation; George Alexander, Mayor of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. Mc-

Kenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk and F. J. Whiffen, Members of and Constituting the Council of the City of Los Angeles; the Board of Public Uutilities of the City of Los Angeles, Lewis R. Works, Martin Bekins and Thomas Foulkes, Members of and Constituting the Board of Public Uutilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles, Appellees, and to John W. Shenk, Esq., Their Solicitor:

You and each of you will please hereby take notice that the above named appellant, Home Telephone & Telegraph Company, a corporation, by its solicitors and counsel, will, at the court room of the Supreme Court of the United States, in the city of Washington, District of Columbia, on Monday, the 13th day of May, 1912, at the hour of eleven o'clock a. m. of said day, or as soon thereafter as agreeable to said court, and counsel can be heard, move the above entitled court to advance the above entitled cause on the calendar, as provided for in the rules of said court. A full, true and correct copy of the motion herein referred to, is attached hereto, and served herewith.

Dated Los Angeles, California, April 10th, 1912.

Gibson, Dunn & Crutcher

Solicitors for Appellant.

J. A. Gibson

Of Counsel.

IN THE

Supreme Court

OF THE

United States.

Home Telephone & Telegraph Company, a corporation,

Appellant,

vs.

City of Los Angeles, a municipal corporation, George Alexander, Mayor of the City of Los Angeles, and M. F. Betkouski, J. A. Andrews, F. C. Langdon, Chas. McKenzie, H. W. Reed, John Topham, George Williams, Robert M. Lusk, and F. J. Whiffen, members of and constituting the Council of the City of Los Angeles, the Board of Public Utilities of the City of Los Angeles, Lewis R. Works, Martin Bekins and Thomas Foulkes, members of and constituting the Board of Public Utilities of the City of Los Angeles, and Charles J. Sebastian, Chief of Police of the City of Los Angeles,

Appellees.

Motion to Advance Cause on Calendar.

Comes now the above named appellant, Home Telephone & Telegraph Company, a corporation, appearing by its solicitors and counsel, and respectfully moves that the above entitled cause be

judge of the District Court of the United States for the Ninth Circuit, in and for the Southern District of California, Southern Division.

VII.

That the question here involved seems to appellant to be one of considerable importance generally and deserving of as reasonably quick a determination as possible agreeably to the pleasure of this Honorable Court. And as the sole question is a jurisdictional question, this motion is made under the law and the rules to advance this said cause on the calendar for hearing.

Wherefore, it is respectfully prayed:

That the appeal at bar be advanced up the calendar and set for hearing at as early a date as is agreeable to this court.

That any other order or orders be made in the premises which may be equitable.

Dated at Los Angeles, California, April 1.2th 1912.

GIBSON, DUNN & CRUTCHER,
Solicitors for Appellant.

JAS. A. GIBSON,
Of Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

No. 610.

Home Telephone and Telegraph Company,

Appellant,

vs.

City of Los Angeles, et al.,

Appellees.

BRIEF OF APPELLANT.

GIBSON, DUNN & CRUTCHER,
Solicitors for Appellant.

JAMES A. GIBSON,
Of Counsel.

Parker & Stone Co., Law Printers, Los Angeles, Cal.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

Home Telephone and Telegraph Company, *Appellant,*	
vs.	
City of Los Angeles, et al., *Appellees.*	

BRIEF OF APPELLANT.

FIRST.

STATEMENT OF THE CASE.

This appeal is prosecuted by the complainant from a decree of the District Court dismissing its amended bill, for supposed want of jurisdiction. The suit was brought to enjoin the enforcement of an ordinance of the defendant city prescribing the rates to be charged by the complainant telephone company.

Allegations of Amended Bill.

The allegations of the amended bill are substantially as follows [Rec., pp. 4 to 37]:

That the complainant is a corporation of the state of California, with its principal place of business in the city of Los Angeles, and is the owner of, and operating, a telephone system within the city, under a franchise from the city, for the term of fifty years from the 8th day of February, 1902.

That this franchise is not an exclusive franchise, and there has been and now is in operation, a competing telephone system within the city of Los Angeles, owned and controlled by the Pacific Telephone & Telegraph Company, a corporation of California.

That the city of Los Angeles is a municipal corporation, duly incorporated under the laws of California, and situated in the county of Los Angeles, in the southern division of the southern district of the state of California.

The capacity in which the remaining defendants, besides the city of Los Angeles, are sued, is then set forth in the usual form.

That the constitution of the state of California permits any city, containing a population of more than 3500 inhabitants, to frame a charter for its own government. That after its adoption by the electors of such city, at an election held for that

purpose, the charter must be submitted to the legislature of the state, for its approval or rejection as a whole, without power of alteration or amendment, and if approved, it shall become the charter of such city, and the organic law thereof.

That it is further provided in the said constitution, that cities and towns in the state of California, and all such charters, except in municipal affairs, shall be subject to and controlled by general laws.

That under said provisions the electors of the city of Los Angeles duly adopted a charter for said city, which charter was duly approved by the legislature of said state on the 31st of January, 1889.

That in and by the provisions of the said charter, as amended, the state of California has delegated to the city of Los Angeles the power to fix and determine the rates or compensation to be collected for telephones and telephone service and connections.

That said charter specifically provides that the board of public utilities of the city of Los Angeles shall have the power to fix, subject to approval, change or modification by the council of the said city, the rates to be charged and collected for such telephone service in the said city.

That on or about the 13th day of June, 1911, under the aforesaid provisions, the said board of public utilities adopted a resolution purporting to

fix the rates to be charged and collected by complainant and its competitor, the Pacific Telephone & Telegraph Company, a corporation, for telephones, telephone service and telephone connections in the city of Los Angeles, during the year commencing July 1, 1911, and ending June 30, 1912. A copy of this resolution is attached to the amended bill as exhibit A. [Rec., p. 20 *et seq.*]

That thereafter objections to the rates so fixed by said resolution were duly filed, and the council of the city of Los Angeles ordered a rehearing. That after such rehearing, on the 28th day of July, 1911, said council duly passed an ordinance purporting to finally fix the rates to be charged and collected by complainant for telephones, telephone service and telephone connections in the city of Los Angeles during said year, a copy of which is attached to the amended bill of complaint as exhibit "B." [Rec., p. 27 *et seq.*]

That the schedule of rates fixed by said ordinance was much lower than the rates prescribed by said resolution of the board of public utilities, and was wholly unreasonable, inadequate and confiscatory.

That complainant, finding itself compelled to seek relief through judicial proceedings, against the unjust and confiscatory rates prescribed by said ordinance of July 28, 1911, has since the passage of the ordinance caused a wholly new in-

ventory and appraisement of its properties to be made.

That this inventory and appraisement is based upon a careful and detailed examination and investigation of all parts of the properties and plant of complainant, and of the present value thereof, except such parts as were exhibited in detail by existing records. That every endeavor has been made to make such inventory and appraisement complete and accurate, and for this purpose complainant has delayed the filing of its original bill of complaint. That said inventory and appraisement was finally completed in November, 1911, and gives the valuation, as accurately as possible, of complainant's physical properties at the close of business on the 30th day of June, 1911.

A schedule of the values of the different classes of complainant's physical properties is then set forth, showing a total valuation of $6,926,457.55. [Rec., fol. 13.]

That said summary and table of values does not contain any estimate of, or allowance for, the value of complainant's franchise, nor the value of complainant's telephone business and telephone system as a going concern, nor the value of the good will of said business or system, nor any value of, or allowance for, working capital. That complainant is justly entitled to a reasonable return on these intangible assets, as well as upon the value of its physical properties.

That the total gross earnings derived from the operation of complainant's telephone system inside said city, was the sum of $1,192,622.89. A particular statement of said gross earnings, showing the several sources, is then set forth. [Rec., p. 11.]

That the actual and necessary current expenses of complainant's said telephone business in the city of Los Angeles, during the year commencing July 1, 1910, together with the average annual allowance necessary to be provided on account of losses due to depreciation and absolescence, amounted to the aggregate sum of $1,153,849.69. Then is set out a particular statement of these expenses. [Rec., p. 13.]

That the net returns of complainant's said telephone system in the city of Los Angeles, during said year commencing July 1, 1910, amounted to only .5597 of one per cent upon the value of the aforesaid physical properties comprised in complainant's said telephone system, and necessarily used in the operation thereof during said year.

That the rates charged and received for said services, during the year commencing July 1, 1910, were substantially the same as the rates attempted to be fixed by said ordinance of July 28, 1911, for the year commencing July 1, 1911.

That the rates fixed for the year commencing July 1, 1910, were so fixed by an ordinance adopted by the council of the city of Los Angeles

against the protest of complainant, and notwithstanding the board of public utilities recommended to said council the adoption of a materially higher schedule of rates.

That complainant refrained from seeking relief by judicial proceedings, from the rates fixed by said council for said year commencing July 1, 1910, in order to avoid vexatious litigation and the loss of the good will of the public, and in order that the precise effect thereof upon the net returns of the business of complainant might be determined by actual experience, and in the hope that a more just and reasonable schedule of rates would be voluntarily fixed by said council for the year beginning July 1, 1911, and succeeding years.

That said council's action in fixing the rates beginning July 1, 1911, was without receiving or seeking any further evidence concerning the value of complainant's properties, or the actual returns of complainant's business, during the year commencing July 1, 1910, or of the rates prescribed for similar telephone services rendered under similar conditions in other cities of the United States, and that said council set aside the action of the board of public utilities without any just cause or reason therefor.

That said ordinance of July 28, 1911, makes it a misdemeanor, punishable by fine or imprisonment, or both, for complainant, or any officer or

agent thereof, to demand, charge, collect, or receive, any rates in excess of the rates purporting to be prescribed by said ordinance, and that if complainaint violates its said ordinance in any of these particulars, complainant and its officers will be subjected to numerous criminal prosecutions under said ordinance, and numerous suits by individual patrons or subscribers, seeking to compel complainant to furnish telephone services at the rates purporting to be prescribed by said ordinance of July 28, 1911. That complainant has upwards of thirty thousand patrons or subscribers to whom services are rendered from month to month. That complainant accepts payment of the ordinance rates only under protest, and reserving the right to hereafter collect such additional compensation as may be judicially determined to be reasonable.

The amended bill prays for an adjudication that the said ordinance of July 28, 1911, is void because in contravention of the constitution of the United States, in that, if said ordinance is enforced, the state of California will thereby deprive complainant of its properties without due process of law, and will deny to complainant the equal protection of the laws.

Defendants' Plea.

The defendants filed a plea challenging the jurisdiction of the court, and alleging that the constitution of the state of California provides that "no person shall be * * * deprived of life, liberty or property without due process of law," and that the complainant, a citizen of the state of California, has never invoked the aid or protection of its said state to prevent the alleged taking of its property, nor appealed to the courts of said state to enforce the law of said state. [Rec., pp. 35-36.]

Decree of Dismissal.

The foregoing plea having been duly heard by the court, was sustained, and a decree thereupon entered dismissing the complainant's amended bill for want of jurisdiction. [Rec., p. 40.] The court adopted as its opinion in support of such dismissal the opinion which it had previously rendered in the cause upon motion for an injunction *pendente lite* to which motion defendants had responded by demurrer, alleging want of jurisdiction. [Rec., p. 41.]

Question Involved.

The sole question presented by this appeal is therefore the jurisdiction of the District Court; and in that behalf the only contention of the defendants is that the ordinance of the defendant

city council purporting to prescribe the rates to be charged by the complainant is not the act of the state of California within the meaning of the fourteenth amendment to the federal constitution, because the state constitution also forbids the deprivation of property without due process of law.

A motion to advance the cause in this court, under rule XXXII, has been made, and the cause is now submitted by the appellant on that motion.

SECOND.

Specification of Errors Relied On.

1.

The court erred by its decree, in that it did not hold that complainant's amended bill of complaint stated a cause within the jurisdiction of the court.

2.

The court erred by its decree, in dismissing complainant's amended bill of complaint.

3.

The court erred by its decree, in holding that the acts of the council of the city of Los Angeles, complained of in complainant's amended bill of complaint, were not state action within the meaning of the fourteenth amendment to the constitution of the United States.

4.

The court erred by its decree, in holding that

the acts complained of in complainant's amended bill of complaint, did not deprive complainant of its property without due process of law, within the meaning of the constitution of the United States.

5.

The court erred by its decree, in holding that the acts complained of in complainant's amended bill of complaint, did not deny to complainant the equal protection of the laws, within the meaning of the constitution of the United States.

6.

The court erred by its decree, in holding that it had no jurisdiction to determine whether the acts of the council of the city of Los Angeles, state of California, in determining and fixing telephone rates, in the ordinance of July 28, 1911, attached to complainant's amended bill of complaint as exhibit "B," under and by virtue of the power in the charter of the city of Los Angeles, and complained of by complainant in its amended bill of complaint, were unreasonable, unjust and confiscatory, within the meaning of the constitution of the United States, or the fourteenth amendment thereto.

THIRD.

BRIEF OF ARGUMENT.

I.

Jurisdiction of Federal Courts Under the Fourteenth Amendment, to Enjoin the Enforcement of Public Utility Rates Prescribed Under Legislative Authority.

The comprehensive reach of the prohibitions of the fourteenth amendment, and the character of the jurisdiction which has resulted therefrom to the federal courts of first instance, are subjects on which this court has frequently declared itself. On the first point, the inhibitive scope of the fourteenth amendment, the doctrine of these decisions was thus restated in an opinion delivered by this court at October term, 1907:

> "The provisions of the fourteenth amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts."
>
> Raymond v. Chicago Union Traction Co., 207 U. S. 20.

In another case decided at the same term, which involved a controversy precisely like that now before the court, namely, an attack upon rates, prescribed under state legislative authority, as a deprivation of property within the meaning of the fourteenth amendment, the nature and ex-

tent of the original jurisdiction of the federal courts in such cases was very thoroughly examined and discussed. Answering the contention there made, that no federal question was involved in such a case because it presented no controversy as to the *construction* of the constitution or laws of the United States, this court said:

> "Jurisdiction is given to the Circuit Court in suits arising under the constitution or laws of the United States (18 Stat. L. 470, Chap. 137), and the question really to be determined under this objection is whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law, and although that question might incidentally involve a question of fact, its solution is one, nevertheless, which raises a federal question. See Hastings v. Ames (C. C. App. 8th C.), 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 726. The sufficiency of rates with reference to the federal constitution is a judicial question, and one over which federal courts have jurisdiction by reason of its federal nature."

Ex parte Young, 209 U. S. 123 (p. 144).

In support of this declaration of the law, the court cited:

Chicago M. & St. P. R. Co. v. Minnesota, 134 U. S. 418;

Reagan v. Farmers' Loan & T. Co., 154 U. S. 369-399.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649;

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578;
Smyth v. Ames, 169 U. S. 466-522;
Chicago M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172.

In *Ex parte* Young, *supra*, on behalf of the attorney general of Minnesota (against whose institution of suits and prosecutions an injunction had been granted by the Circuit Court), the further objection was made that the suit was in effect against the state, and therefore withdrawn from federal cognizance by the eleventh amendment. After an exhaustive review of the prior cases dealing with that amendment, the court summarized its conclusions therefrom, as follows:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected, an unconstitutional act, violating the federal constitution, may be enjoined by a federal court of equity from such action."
>
> *Ex parte* Young, *supra*, 209 U. S. p. 155.

The decisions of this court, to the same effect as those above cited, are too numerous, and some of them too recent, to require specific citation.

By these authorities the principle is established beyond dispute, that every act of a state officer or agency, exercising the power of the state, by which any individual may be deprived of property without due process of law, is prohibited by the fourteenth amendment; and the federal courts, when seasonably appealed to, have original jurisdiction to enjoin every such act.

II.

Nature and Scope of the Contention on Which Defendants' Objection to the Jurisdiction in this Case is Based.

We may concede that the contention, that what is forbidden by the constitution of a state cannot be the act of that state, has an appearance of plausibility. Nevertheless we are persuaded that but slight examination is required to dissipate that appearance.

A prime consideration against the soundness of defendants' contention is that ever since the adoption of the fourteenth amendment, the constitutions of some two-thirds of the states of the Union have contained prohibitions against the deprivation of property without due process of law. (See Stimson's Federal and State Constitutions, Sec. 130, p. 169.) And many, if not all, of the cases in which the inferior federal courts (and this court on appeal therefrom) have assumed jurisdiction to enforce the guaranty of

due process in the fourteenth amendment, have arisen in such states. So that, in every one of such cases, if the defendants' contention be sound, this court, as well as the lower courts of the United States, have exercised a jurisdiction which they did not lawfully possess. This circumstance of itself must raise a grave suspicion as to the soundness of defendants' contention: and the more the merits of that contention are examined, the more will its unsoundness become apparent.

The decisions of this court establish that, within the meaning of the fourteenth amendment, every act done by the authority of the state is to be deemed the act of the state itself. That principle will not be disputed; but defendants seek to escape its effect by maintaining that no officer or agent of the state can in any manner be given authority to do that which the constitution of the state forbids. But certainly it must be just as true that no officer or agent of the state can be given authority to do that which the constitution of the United States forbids: for that instrument itself declares that it is "the supreme law of the land," and that "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." If it were true, then, that within the meaning of the fourteenth amendment, no act forbidden by a state constitu-

tion could be deemed to be the act of the state, so as to give federal courts jurisdiction to restrain or redress it, until the state courts have sanctioned such act, then the same must be held equally true of any act forbidden by the federal constitution: and thus all original jurisdiction of the federal courts to enforce the guarantys of the fourteenth amendment would be destroyed in every state whose constitution contains a like guaranty.

Furthermore, defendants' contention, followed to its logical and necessary conclusion, will not only destroy the original jurisdiction of the inferior federal courts (and the jurisdiction of this court on appeal therefrom), but will also take from this court all jurisdiction to enforce the fourteenth amendment, in a state whose constitution contains similar prohibitions, by reviewing the judgments of the courts of such state. For if a case, in which denial of due process is charged, were brought to this court on appeal or writ of error to the court of such a state, and this court should therein determine that the charge were true, this would only establish, if defendants' contention here is correct, that the act complained of was done in violation of the constitution, and therefore without the authority, of the state, and so was not prohibited by the federal constitution or remediable by this, or any, federal court.

Defendants cannot escape this consequence of

their position by asserting that, in the case supposed, the question of violation of the state constitution would have been finally determined by the courts of the state, and that this court would only be considering the question of the violation of the federal constitution. For obviously this is an immediate and complete admission that the two questions are distinct and different; that the courts of the state may give a different meaning and effect to the state constitution from that given by this court to similar terms in the federal constitution. We submit, indeed, that this is the true conception of the matter, which the judicial history of these guaranties, in the courts of the several states and in this court, would support. So that, in our case, and in every similar case, where a deprivation of property by the act of state officers or agents is alleged (occurring in a state whose constitution prohibits such deprivation), the question, whether the federal constitution has been violated thereby, is entirely distinct and separate from the question whether the state constitution has also been violated; and the complaining party, whether a citizen of that state or of another state, has the right to have such federal question determined in the first instance, as well as finally, by the courts of the nation, which have been instituted for that very purpose.

Certainly, we submit, the defendants whose acts are complained of in such a case, who have,

by their very conduct, asserted their authority under the state to perform such acts, may not compel the complainant, injured by those acts, to go into the state courts for the sole purpose of controverting the authority of the defendants, which they themselves have asserted, and which they would again maintain before such courts.

A contention which leads to such untoward consequences must be erroneous; and the fundamental error of defendants' contention consists, we submit, in the failure to distinguish between the total absence of authority, on the one hand, and the wrongful exercise of authority on the other hand.

But the decisions of this court under the fourteenth Amendment have made clear that it is quite possible for a state to so frame its legislation, and so distribute its governmental powers, as to invest a particular officer or agent with the actual power to do that which the laws, or even the constitution, of the state purport to forbid. An example of such wrongful exercise of authority, familiar to the mind of every lawyer, and which will suffice to point our contention, is found in the judgment of a court, erroneous in point of law, but nevertheless within its authorized jurisdiction. The decisions of this court demonstrate, however, a variety of forms and directions in which such actual powers of the state may be exerted in a manner, or to an end, forbidden by the

laws of the state; and these we shall ask the court to examine at length; for they also establish that every such actual exertion of the power of the state, resulting in a deprivation of property without due process, is forbidden by the federal constitution, and is remediable in the federal courts, although it may also be a violation of state law, and remediable as such in the state courts.

Defendants, it may be, will say that they admit the possibility of such wrongful exercise of authority by state officers and agencies, and that they only contend that redress for such wrongs should be first sought in the courts of the state. This contention is directly refuted by the decisions of this court just mentioned, which we propose later to review in detail, and which we need not burden the court by now repeating.

But here we would point out that this contention, that redress for the wrongful acts of state agencies in exerting the powers of the state must be sought in the state courts, is also wholly repugnant to the general intent of the fourteenth amendment, as that intent has been interpreted by many decisions of this court, in addition to the particular line of cases last referred to. It is also, we contend, opposed to the settled doctrine of this court that a suitor's constitutional choice of forum cannot be denied.

By all these decisions it has been iterated and reiterated that the prohibitions of the fourteenth

amendment comprehend all action of the state whether by its legislative, its executive, or its judicial department. The contention of the defendants is manifestly contrary to that doctrine, for it would make the judicial department of the state the sole organ of state action within the purview of the fourteenth amendment. That contention would change the all embracing words of the amendment: "No *state* shall deprive any person," etc., to read: "No *court* of any state shall deprive any person," etc.

The truth is, we submit, that the decisions of this court furnish a very simple test by which to determine the existence of federal jurisdiction in the class of cases with which we are here concerned. That test lies in the question: Do the facts pleaded show that the complainant has been, or is about to be, deprived of his property without due process of law, *by any exertion of the power of the state?* If this does appear, then federal jurisdiction attaches, regardless of the character of the agency or instrument through which such power of the state is exerted. Nor, under those decisions, does it affect the right or duty of the federal courts to exercise that jurisdiction, that there may exist a concurrent jurisdiction in the state courts, over the same case, because the act complained of also violates state law.

Finally, we shall contend that the guaranty of equal protection of the laws, under the fourteenth

amendment,—to which there is no equivalent in the state constitution,—affords a distinct ground of federal jurisdiction, wholly independent of complainant's claim under the due process guaranty of the federal constitution; so that this case, at least, gives no room whatever for defendants' objection based on the due process clause of the state constitution. Perhaps this point should be first presented, since it renders consideration of all other points unnecessary. But it was not adverted to in the opinion of the court below, and we therefore defer its discussion until the ground on which the opinion proceeds shall have been disposed of.

We shall endeavor, in succeeding portions of our argument, to more fully demonstrate the several propositions of law which we have here asserted, by specific examination of apposite decisions of this court. But in order that the true bearing of those authorities upon the present case may be fully apparent, we first invite the consideration of the court to the significant nature of the governmental action here in question, namely, the prescribing of public utility rates under state legislative authority.

III.

Nature and Effect of Legislative Regulation of Public Utility Rates, in its Bearing on the Jurisdictional Question Here Involved.

There is no question in this case that the charter of the defendant city confers upon its council the power to prescribe the rates to be charged for telephone service within the city. These provisions of the charter are summarized in the allegations of the bill. [Rec., fol. 9.]

The charter also expressly confers upon the city council the general power of making the violation of its ordinances a misdemeanor, punishable by fine and imprisonment. (L. A. City Charter, Sec. 2. Sub. 31; Cal. Stats. 1911, p. 2064.)

The rates adopted by these authorities of the city, in accordance with such charter provisions, are not required to be submitted to or approved by any court or other tribunal, in order to become operative and effectual. There is no dispute, however, that the courts of the state have jurisdiction to pronounce rates so adopted to be in violation of the requirements of the federal constitution, or of the state constitution, if it contained any requirement affecting such rates.

The important question in the present case is the precise legal and practical effect of the passage of a rate ordinance, which is, or is alleged to be, in conflict with constitutional requirements. The answer to that question must be found in a

consideration of the situation which exists in the absence of a legislative or governmental regulation of rates, and of the change which is made in that situation by the enactment of such a regulation.

Until the enactment, by competent authority, of an ordinance or other regulation prescribing the specific rates to be charged, it is clear that the owner of a public utility may refuse to render service to the public, except at such reasonable rates as he may himself establish. If any individual should demand service at a less rate, and seek to enforce that demand by judicial proceedings, by mandamus, for example, the burden would unquestionably be upon him to establish his right to service at a less rate than that demanded by the utility owner; and the latter rate, being, in the case supposed, reasonable in fact, it must be presumed that an attempt to enforce service at a less rate would fail. And substantially the same burden would rest upon one who, after accepting service and paying the established charge therefor, should attempt to recover back some part of the charge as being excessive.

See:

Illinois C. R. Co. v. I. C. Commission, 206 U. S. 441, at pp. 464-5.

In brief, where there has been no government regulation of charges, the public utility owner has

both the legal right and the practical ability to obtain the full amount of reasonable compensation for services rendered. Neither in law nor in fact is there any compulsion upon him to render service for any less compensation. The right to receive such reasonable compensation is undoubtedly to be regarded as a right of property, under the settled decisions of this court holding the deprivation of the right to be forbidden by the fourteenth amendment. So regarding the right, the owner of the utility may be aptly said to be in possession of such property.

Now, compare with this the situation which arises where a rate regulation has been adopted, by an agency of the state invested with appropriate power, and that regulation prescribes a rate less than what the utility owner is justly entitled to receive. In such case, even if no penalties of fine or imprisonment are imposed for violation of the rate, the owner is no longer free to charge, or practically able to collect, reasonable compensation for services rendered, such compensation being beyond the limit fixed by the confiscatory regulation.

For if the owner should demand such higher but reasonable compensation, and refuse to render service without its payment, then any party demanding service at the prescribed rate could enforce that demand by appropriate judicial action, such as mandamus. In any such action the

validity of the rate so fixed by competent public authority would be presumed. Such *prima facie* validity of the rate prescribed is a consequence inherent in the grant of power to prescribe rates. To say that a designated body has the power to prescribe rates, and yet deny that the rate prescribed by that body is *prima facie* the legal rate and binding as such, would be a self-contradiction. As this court has said:

> "An act of the legislature, fixing rates either for passengers or freight, is to be regarded as *prima facie* valid, and the onus rests upon the company to prove its assertion to the contrary."
>
> *Ex parte* Young, 209 U. S. 123 (p. 165).

Hence in case of such an action as above supposed, the burden would unquestionably be upon the utility owner to establish the unreasonableness of the rate prescribed by public authority; failing in that defense, judgment would be granted as a matter of course, enforcing service at the rate so prescribed.

And so, if the utility owner should render the service without payment in advance, and thereafter seek to recover such higher compensation, the burden would again be upon him to overcome the *prima facie* effect and validity of the rate prescribed, and to establish his right to any greater rate.

Again, if we assume that the utility owner

might, by refusing to render service at the prescribed rate, be able to exact higher compensation in advance, he would still not have escaped from the effect of the public regulation. For, under the modern doctrine, such refusal to render a public utility service—at least where the circumstances made it a business necessity with the party demanding it—would amount to such duress as would make the payment involuntary, and subject to recovery by suit; in which suit, again, the validity of the prescribed rate would be presumed against the utility owner.

Robertson v. Frank Bros., 132 U. S. 17, and cases cited;

Burke v. Gould, 105 Cal. 281;

Chicago v. N. W. Mut. Life Ins. Co., 218 Ill. 40, 75 N. E. 803, and cases cited.

Thus, at every turn, the *prima facie* validity of a rate prescribed by an authorized agency of the state confronts the utility owner and places upon him the burden of judicially establishing the unreasonableness and invalidity of such rate, as a condition precedent to exercising his constitutional right to charge and receive reasonable compensation for services rendered. And hence, again regarding this right as property, it is clear that the owner has been deprived of its possession. The consideration that he may be able to recover it by judicial proceedings no more alters

the fact of his deprivation, than does the like ability to recover the possession of land by an action of ejectment lessen the fact of deprivation to the owner who has been ousted of such possession.

If the language which we have thus used to describe the situation created by a confiscatory rate regulation be criticised as figurative, our answer is that the wrongful restraint of the right to reasonable compensation, which that situation involves in its legal effect, is real and substantial, and is an actual and practical deprivation of the right itself.

There are many decisions of this court, some of them we have already cited, holding that a state law or regulation prescribing confiscatory rates for a public utility is a deprivation of property without due process of law. It is a necessary deduction from those cases, we submit, that the obnoxious character of such law does not depend upon the means which the state may take to enforce submission to it. The prohibited deprivation is accomplished if any substantial degree of coercion is exerted, under authority of the state, to secure conformity to the rates prescribed.

Now it is certainly a fact, and one of which this court will take judicial notice, that the task of establishing, by competent and satisfactory evidence, the unreasonable character of a rate prescribed by a public authority is always one of

great difficulty, except in the unusual (although not unprecedented) case of a prescribed rate which is insufficient even to defray the necessary, immediate expense of rendering the service. In every other case, where the factors of extent and value of the property employed in the service, the actual or probable return from the rate prescribed if enforced, and the portion of such return which must be expended for operation and maintenance, or set aside to meet depreciation, must all be established by evidence, such suit is difficult to maintain despite its intrinsic merit, and a very heavy pecuniary burden, and consequent loss, is imposed upon the owner of the utility in vindicating his constitutional rights,—ordinarily he cannot recoup even if his suit be successful. See the observations of this court (to which we will again refer) in

Ex parte Young, *supra*, 209 U. S. 123 (pp. 148, 164).

It is, of course, possible that no such attempt as we have supposed, to obtain the benefit of the prescribed rates, would be made by individuals desiring service from the utility affected. But it cannot be presumed that such would be the case, nor is it at all probable, and it is expressly negatived, in the case at bar, by the allegations of complainant's bill. [Rec., par. XIX, p. 16.] The burden which would be placed upon the

utility owner in an action of either of the classes suggested would be so great that the threat of such an action would be enough of itself to coerce compliance with the demands of any single individual. Indeed, the utility owner could much better afford to thus compromise with a great number of individual demands rather than attempt to defend one such suit on the ground of the confiscatory character of the rate prescribed. The only escape, therefore, from such demands (and from actions to enforce them, if not yielded to) would be by an equitable suit brought by the utility owner himself against all who might threaten such proceedings,—and others in like situation,—to enjoin this multiplicity of actions; which suit, of course, could only be maintained by establishing therein the confiscatory character of the prescribed rate.

Hence it is evident, as a practical matter of fact, that the prescribing of a confiscatory rate, by a body invested with the legislative authority to fix rates, would of itself operate to deprive the utility owner affected, of the right of property secured to him under the fourteenth amendment, —the right to receive reasonable compensation for service rendered to the public—by preventing him from exercising or enjoying that right except at the expense of first judicially establishing the confiscatory character of the prescribed rate.

It is also thus apparent that every rate regula-

tion, prescribed by an agency to which legislative power in that regard has been delegated, does by its mere enactment carry a very substantial and effective sanction in the *prima facie* validity which necessarily attaches to rates so prescribed, even though they be in fact confiscatory.

In the case in hand, however, the state, acting through its duly authorized agency, has not stopped with imposing the burden of establishing the invalidity of a confiscatory rate, as means of enforcing it. The violation of this rate ordinance has been made a misdemeanor punishable by fine not exceeding two hundred dollars, and imprisonment not exceeding one hundred days, for each offense. [Ordinance, Sec. 7; Rec., fol. 51.] Upon reading section 2 of the ordinance [Rec., fol. 48], it will be seen that these penalties apply not only to the complainant corporation itself, but to every employee and agent of the complainant, who shall "charge, demand, collect or receive any rate in excess of the rate fixed by this ordinance."

The number of individual subscribers to complainant's telephone system, as alleged in the bill, is upwards of thirty thousand. [Rec., par. XX, fol. 24.] The aggregate fines which might be imposed upon the complainant corporation itself for charging higher rates *for a single month* would therefore amount to more than *six million dollars*, or a sum approximating *the total value of complainant's plant*. [Rec. fol. 13.] And

this amount must be multiplied by the total number of individual officers and agents of the complainant concerned in the collection, in order to ascertain the total pecuniary loss which the city has threatened to occasion as the penalty for disregarding the rates prescribed. And over and beyond this pecuniary loss is the threat of imprisonment for one hundred days for each of these individual agents of the complainant, participating in any violation of the ordinance.

It is true, of course, that we have stated the maximum penalties which might be imposed for the violation of this ordinance—though only for one month's violation, however—and it is also true that complainant would be entitled to make the defense against each prosecution for alleged violation of the ordinance, that the rates prescribed thereby were confiscatory and the ordinance therefore void.

But the establishment of this defense, as already suggested, imposes of itself a great pecuniary burden and loss upon complainant, even in a single case, and there would be nothing to prevent numerous prosecutions being carried on at the same time. A disregard of the ordinance for a single month would involve more than thirty thousand violations of its provisions, simultaneously occurring, and therefore liable to be simultaneously prosecuted. It is true that the prosecuting officers and the criminal courts might, as

a matter of grace, let the question of the confiscatory character of the rates be tried out in one case as a test; but they would be liberally exercising their discretion in so doing, and could not be compelled to take this course except through such an injunction as is sought by complainant's bill.

Moreover, in determining the coercive effect of such a rate regulation, and of the penalties, if any, prescribed for its violation, there must be considered the uncertainty of judicially establishing the confiscatory character of rates legislatively prescribed.

For this court has repeatedly announced and adhered to a very exacting rule regarding the degree of proof required to establish the confiscatory character of a public utility rate, established under legislative authority. And it has more than once reversed the decree of a trial court, based upon the finding of such confiscatory character, upon the ground that the evidence left some doubt as to the actual effect of the questioned rate upon the net returns of the business affected, and that such actual effect must be determined by a trial of the rate before its enforcement would be enjoined.

Knoxville v. Water Co., 212 U. S. 1;
Willcox v. Gas Co., 212 U. S. 19;
Louisville v. Telephone Co. (decided June 7, 1912), 225 U. S. ....

So far as our observation extends, the courts of the several states have confined the granting of judicial relief against legislative rates within bounds quite as narrow. Certainly this is true of the courts of California. (See, e. g., Contra Costa Water Co. v. Oakland, 159 Cal. 323.) It would be idle for us, or anyone, now to quarrel with the rule thus adopted, or to question the sufficiency of the grounds on which it is rested, and we do not propose to do so. But the consideration which we earnestly urge upon the attention of the court is that so long as judicial relief is thus restricted to cases in which the evidence leaves no substantial doubt of the confiscatory effect of the prescribed rates, it must be difficult, and often impossible, for the utility owner to establish the fact of confiscatory character *although it exists*. For it ought to be, and in the long run it will probably prove to be, the exception when a public utility commission or similar body prescribes a rate so low that its confiscatory character can readily be convincingly demonstrated. If these bodies are not actuated by any higher motive, they will at least be constrained by the fear of judicial interference to prescribe rates high enough to be within the zone of judicial doubt.

Let us repeat that we are not criticising this rule of the courts as to degree of proof required, or denying its wisdom or necessity. We are only

asking the court to consider the inevitable consequences of applying such a rule to cases presenting the difficult and doubtful questions of fact on which this class of cases necessarily depend.

There is, in the first place, an inherent uncertainty as to the effect of any given rate upon the returns of the business affected, arising from the possibility of increased patronage just because of lower rates. There are further, and likewise inherent, difficulties of establishing each of the other necessary elements involved in the assertion that a given rate is confiscatory, viz., the value of the property employed in rendering the service, the amount of necessary expenses of operation and maintenance, and the amount of average depreciation due to age, obsolescence and interference by public authorities. Each of these three elements depends in very large part on questions of opinion on which equally competent witnesses will disagree, even when not affected by bias for or against the parties to the suit.

And these matters are not only largely dependent on opinions and estimates, but also in part upon evidence of a nature difficult to procure and properly present. Records extending over a long series of years are usually involved, likely to be inadequate if not inaccurate, even if available at all. And in a plant of any size, there is necessarily a vast amount of complex detail in proving the several elements of which it is composed. The

difficulty of preparing this great mass of evidence, dealing with innumerable and, individually considered, petty details, and the further difficulty of so marshalling that evidence as to make a just and adequate impression upon the judicial mind which must pass on its sufficiency, will surely be conceded, Indeed, this court will only need to recur to the numerous instances in which it has been called upon to review the transcript of evidence produced in such cases to fully appreciate both the truth and significance of the facts we have endeavored to state.

For the coercive effect of these considerations, of the great difficulty and uncertainty attending this class of litigation, must be obvious. Their significance will be emphasized, too, by reference to the several instances in which this court has been obliged to reverse the findings of trial courts which had held rates to be confiscatory.

With these precedents before the mind of the officers and counsel of public service corporations confronted with the problem of meeting a confiscatory rate regulation, how can they have any confidence of ultimate success in attacking such rate, even though it appears clear to them that it will not afford a just return? Are they not bound to consider that what may seem perfectly clear to them, it may be impossible to make clear to others? And if they are wise and prudent, will they not be thus deterred from disregarding such

a rate regulation, by demanding reasonable compensation for services rendered, until the invalidity of the rate prescribed has been judicially established?

The difficulty of establishing the defense of confiscatory character of the rates involved, and the uncertainty of result in such litigation, were recognized by this court in *Ex parte* Young, *supra*. These matters were there being considered with reference to the question whether the imposing of penalties of fine and imprisonment before judicial ascertainment of the reasonableness of the rate amounted to a denial of equal protection of the laws, and also as to whether, in such a case, an injunction in equity against the enforcement of the penal provisions of the law was an appropriate remedy. The first of these questions is one which must also arise in the case at bar, and requires, and will receive, separate examination. But the observations of this court in the case last referred to, are equally pertinent to the present questions, and submit we would emphasize the following brief excerpts therefrom:

> "It would be difficult, if not impossible, for the company to obtain officers, agents, or employees, willing to carry on its affairs, except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided in violating orders of the commission. The company, in order to

test the validity of the acts, must find some agent or employee willing to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the court, either state or federal, for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. * * *

"If, however, one should be found, and the prosecutor should elect to proceed against him, the defense that the act was invalid because the rates established by it were too low, would require a long and difficult examination of quite complicated facts, upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligibly pass upon the matter. * * *

"To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court, by writ of error to the highest state court, would place the company in peril of large loss, and its agents in great risk of fine and imprisonment, if it should be finally determined that the act was valid. *This risk the company ought not be required to take.*"

Ex parte Young, 209 U. S. pp. 145, 164, 165.

It is true that the penalties under consideration in that case were heavier, for a single offense, than those prescribed by the ordinance here in-

volved; but that does not affect the principle which the court stated. Certainly the penalties of the ordinance here in question are severe enough to invoke the application of that doctrine. As we have pointed out, the fines which might be visited upon the corporation itself, for a single month's disregard of the ordinance rates, would amount to nearly the total value of its physical plant,—upwards of six million dollars. And this is in addition to all the penalties of both imprisonment and fine which might be inflicted at the same time upon the corporation's officers and agents.

The necessary consequence of such a law or ordinance, is that the utility owner affected thereby does not dare, he cannot afford, to risk the penal consequences of violating the rate regulation, although he is himself fully satisfied of its confiscatory character. His only safe course is to seek the judgment of a competent court, establishing the fact of such confiscatory character, and enjoining further enforcement of the regulation; and in the meantime he must submit and conform to the regulation, confiscatory though it be. Thus it is obvious that from the moment that such a regulation so sanctioned takes effect, in the legislative sense, the utility owner is deprived of his property, his right to receive reasonable compensation—and in fact of a part of the compensation itself; and this deprivation will

continue until he obtains such a protective judgment of a competent court.

How can it be doubted that a suit seeking such relief is one arising under the constitution of the United States, and therefore within the original jurisdiction of the federal courts? The situation which makes such relief imperative is the direct and necessary result of the enacting of the rate regulation by a body having jurisdiction, i. e., invested with the authority of the state to that end. No sanction of any court, and no action whatever of any other tribunal of the state, is required to make the rate regulation thus effective, or to make it accomplish such deprivation of property. And all of this coercive force and effect of such an ordinance, it is to be observed, is solely due to the fact that the body which enacts it has been invested by the state with legislative authority to prescribe rates and denounce penalties; and is not in any degree lessened by the state's constitutional guaranty, in terms, of due process of law.

That such a case is necessarily one of federal cognizance, is fully established, we submit by the decisions of this court which we shall now ask it to examine.

IV.

Under the Decisions of this Court Construing and Enforcing the Fourteenth Amendment, Federal Courts have Original Jurisdiction to Restrain and Redress Acts of State Officers and Agencies Forbidden by that Amendment, Notwithstanding Such Acts are also Contrary to the Law of the State.

Before proceeding to that examination, however, we must again point out that *this case* presents an entirely independent federal question and ground of jurisdiction, arising under the equal protection clause of the fourteenth amendment, because of the obnoxious character of the penal provisions of this ordinance,—the discussion of which point will follow our argument on the merits of defendants' contention, in any case.

A construction of the fourteenth amendment, which we submit is controlling in the present controversy, was adopted in a group of cases which arose and were decided not long after its adoption. Those cases called for a construction not only of the fourteenth amendment itself, but also of legislation which congress had enacted with a view to making more effective the constitutional prohibitions.

Most of those cases turned on the right of a person of the colored race, accused of crime, to be indicted by a grand jury and tried by a petit jury in the selection of which there has been no

discrimination on account of race. That right this court held to be secured to such persons by the guaranty of equal protection of the laws; but further, and somewhat different, questions were presented by the various cases, touching the manner of enforcing that right.

In one of the cases above referred to, it appeared that the statutes of the state of West Virginia confined the right of jury service to persons of the white race. In that case the decision of this court was that a person of the negro race, indicted for crime under the laws of such state, was entitled to have his case removed to the Circuit Court of the United States for trial, in accordance with the provisions of section 641 of the Revised Statutes.

Strauder v. West Virginia, 100 U. S. 303.

In the second of this group of cases, a petition for a like removal, under the same statute, had been made by a colored person indicted for crime under the laws of the state of Virginia. This petition alleged in substance that the laws of the state qualified colored persons to serve on juries equally with white persons, but that colored persons had never in fact been summoned on juries; that the petitioner had demanded that some such persons should be summoned upon the jury empaneled to try his case and that the demand had been refused; and that by reason of the prejudice

against his race existing in the community he could not have a fair trial before a jury composed wholly of white persons. The decision of this court was that such petition showed no ground for removal under that act (R. S., Sec. 641). Discussing that question the court said:

> "The provisions of the fourteenth amendment of the constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals.
> * * *
>
> "It is doubtless true that a state may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the fourteenth amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the state. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a state court in which it is denied, into a federal court where it will be acknowledged. Of this there can be no reasonable doubt. Removal of cases from state courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted."

Virginia v. Rives, 100 U. S. 313 (318).

It was then observed that congress could undoubtedly have provided for the removal into the federal courts of every case in which the rights secured by the amendment might be denied, but that clearly it had not done so by the provisions of R. S., Sec. 641, as to which the court said: "The constitutional amendment is broader than the provisions of that section."

And after a consideration of the terms of the section the conclusion was reached that the denial or inability to enforce rights in the judicial tribunals of the state, of which that statute speaks, "is primarily, if not exclusively, a denial of such rights, or an inability to enforce them resulting from the constitution or laws of the state rather than a denial first made manifest at the trial of the case."

For, it was held, as the statute only provided for removal before trial, it could not have intended to authorize such a removal on account of acts of merely administrative or ministerial officers, contrary to state law, and which could be, and it must be presumed would be, redressed by the court when properly brought to its attention at the trial. But it was not held that such a ministerial act could not be an act of the state, and prohibited by the fourteenth amendment. On the contrary it was said:

> "If, as was alleged in the argument, though it does not appear in the petition or

record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute of the state, confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the state's laws, as well as of the act of congress of March 1, 1875, which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the state and under the laws of the United States. *In one sense, indeed, his act was the act of the state, and was prohibited by the constitutional amendment.* But inasmuch as it was a criminal misuse of the state law, it cannot be said to have been such a 'denial or inability to enforce in the judicial tribunals of the state' the rights of colored men as is contemplated by the removal act."

Virginia v. Rives, 100 U. S. 313 (pp. 318-321).

The third of this group of cases arose under a different act of congress, namely, the Act of March 1, 1875 (St. L. Part 3, 336). That act made it a felony for any officer, or other person charged with the selection of jurors, to exclude or fail to summon any person "on account of race, color or previous condition of servitude." The petitioner in that case was held in custody on an indictment under the statute and sought release by writ of *habeas corpus* from this court on

the ground that such legislation was beyond the power of congress under the fourteenth amendment. But this court sustained the validity of the act, discussing at some length the purpose of the fourteenth amendment and calling attention to its express provision for legislation by congress in enforcement thereof. Conceding that "the prohibitions of the fourteenth amendment are addressed to the states," the opinion of this court further said (speaking of those prohibitions):

> "They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it."

The further objection was made to the validity of the act as applied to the case then before the

court that "congress cannot punish a state judge for his official acts," and as the accused was such an officer, his selection of jurors was claimed to be a judicial act. This court emphatically denied the claim that such act was of a judicial nature, declaring it to be merely ministerial, whether performed by a sheriff or a judge. But it further said:

> "But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the state statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the act of congress is unconstitutional because it inflicts penalties upon state judges for their judicial action. It does no such thing."
>
> *Ex parte* Virginia, 100 U. S. 339 (pp. 346, 348).

We ask particular attention to the portion of the opinion in *Ex parte* Virginia last cited because it clearly shows that the act of the state officer in question was not regarded as the judgment of a court. On the contrary, it was declared to be merely ministerial; and it must have been regarded by this court as capable of being remedied by suitable objection being made at the trial,

as had just been pointed out in Virginia v. Rives, *supra* (the opinion in which was delivered, for this court, by the same learned justice). But this court held, in effect, that it was not required that application for such relief should be made to the state courts, and their sanction of the act obtained, before it could be regarded as an act of the state, prohibited by the fourteenth amendment, and therefore within the jurisdiction of congress to make punishable as a criminal offense under the laws of the United States. The decision that such an act was so punishable by act of congress necessarily implied, what this court indeed expressly affirmed, that such an act of a state officer, although also forbidden by the state law, and though no redress therefor had been sought from the state courts, was the act of the state within the fourteenth amendment. If such an act is within the jurisdiction of the federal legislature to punish, as forbidden by that amendment, it must equally be within the jurisdiction of the federal courts to restrain or redress, as being so forbidden.

The language first above quoted from the decision in *Ex parte* Virginia, declaring the comprehensive scope of the fourteenth amendment, has been accepted as a true definition thereof in all the later decisions of this court and frequently quoted as such. The further proposition, which results from the language last quoted, namely,

that the prohibitions of the fourteenth amendment extend to every act of a state officer done in his capacity as such, notwithstanding it may be contrary to the law of the state, was equally involved in the case, as we have pointed out, and has likewise been accepted unquestioningly in subsequent decisions. Its force is strikingly emphasized by the comparison of this decision, which we have suggested, with the ruling in Virginia v. Rives, *supra,* which arose under the same state statutes and constitutional provisions. In the last named case it was held, as shown, that the acts of officers charged with the selection of jurors, although denying a right secured by the fourteenth amendment, did not afford cause for removal of a case into the federal courts under R. S., Sec. 641. It was not there held, however, that such acts were not within the prohibition of the fourteenth amendment: on the contrary, it was explicitly affirmed that "the constitutional amendment is broader than the provisions of the statute"; and it was said that the act of the administrative officer there complained of, although "a criminal misuse" of the state law, was "the act of the state and was prohibited by the constitutional amendment."

But it was further held that such act was not within *the statute* because *that* applied to acts of ministerial officers only when done in obedience to the law of the state. *Ex parte* Virginia holds,

on the other hand (although conceding this decision in Virginia v. Rives), that such ministerial acts of state officers are obnoxious to the fourteenth amendment even though done in disobedience to state law.

This proposition that the act of a state officer, although a violation of his duty under the law of the state, may nevertheless be the act of the state within the purview of the fourteenth amendment, was affirmed by the decision of this court in another similar case arising under the fourteenth amendment and R. S., Sec. 641, and decided at the next term after the cases we have above alluded to. We refer to *Neal v. Delaware*, where a petition for removal under this statute had been made on the ground of discrimination against the colored race in the selection of grand and petit jurors and denied by the state court, as well as motions to quash the indictment and the jury panels on the same ground. It appeared that jury service in Delaware under the constitution and laws of that state as interpreted and enforced by its courts, was open to persons of the negro race equally with whites. This court accordingly decided that the petition for removal was rightly denied under the rule laid down in Virginia v. Rives. But as to the motions to quash the indictment and jury panels because of the exclusion of colored persons from such juries, this court said:

"It was, we think, under all the circumstances, a violent presumption which the state court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the state; and the refusal of the state court to redress the wrong by them committed was a denial of a right secured to the prisoner by the constitution and laws of the United States. Speaking by Mr. Justice Strong, in *Ex parte Virginia*, we said, and now repeat, that 'a state acts by its legislative, its executive, or its judicial authorities. It can act in no other way.' (And the court then repeat the whole passage which we have above quoted from *Ex parte* Virginia, concluding):

"This must be so, or the constitutional prohibition has no meaning."

Neal v. Delaware, 103 U. S. 370 (397).

We emphasize this recital of the definition of the scope of the fourteenth amendment laid down in *Ex parte* Virginia, because its re-statement in connection with the facts in Neal v. Delaware exemplifies its full significance as applied to the acts of state officers which are beyond their lawful authority, but nevertheless within the actual power which the state has conferred upon them. For as we have stated, it appeared in that case that the laws of Delaware did not sanction such

discrimination in the selection of jurors as this court held was shown on the part of the summoning officers,—whose act nevertheless was declared to be the act of the state, precisely as it was in *Ex parte* Virginia, *supra.*

Neal v. Delaware, *supra,* was cited and followed in a comparatively recent case presenting almost identical facts, wherein the court stated the rule of decision thus:

> "Whenever by any action of a state, whether through its legislature, through its courts or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him contrary to the fourteenth amendment of the constitution of the United States."
>
> Carter v. Texas, 177 U. S. 442 (447).

This construction of the guaranties of the fourteenth amendment in respect to the selection of jurors has been approved in a number of other cases in which, however, the particular relief sought was denied on grounds similar to those which prevailed in Virginia v. Rives. In this category are the following relatively late cases:

Gibson v. Mississippi, 162 U. S. 579;
Williams v. Mississippi, 170 U. S. 213;
Tarrance v. Florida, 188 U. S. 519;
Martin v. Texas, 200 U. S. 316.

In the cases of Yick Wo v. Hopkins and Wo Lee v. Hopkins, the principle for which we are contending was given another application, and a new form of statement repeatedly approved in subsequent decisions. In one of the two cases mentioned (which were disposed of by this court in one opinion) a writ of *habeas corpus* was sought from the Circuit Court of the United States on behalf of a Chinaman convicted of violation of an ordinance of the city of San Francisco, and this court held that the writ should have been allowed. The ordinance purported to regulate the maintenance of laundries in that city, and among other things prohibited laundries in wooden buildings without a permit from the board of supervisors. It was alleged that in the administration of this ordinance such permits were uniformly denied to applicants of the Chinese race and almost universally granted to applicants of any other race. This court expressed the opinion that the vesting of such arbitrary power as appeared to be conferred by this ordinance upon a local legislative or administrative body was contrary to the fundamental rights guaranteed by the fourteenth amendment and rendered the ordinance void. But it further said:

> "This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In

the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in Henderson v. Mayor of New York, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275; *Ex parte* Virginia, 100 U. S. 339; Neal v. Delaware, 103 U. S. 370; and Soon Hing v. Crowley, 113 U. S. 703."

Yick Wo v. Hopkins, 118 U. S. 356 (pp. 373-374).

The specific application which was thus given to this interpretation of the fourteenth amendment in Yick Wo v. Hopkins, *supra*, has likewise been approved in recent decisions of this court. Thus in the case of Dobbins v. Los Angeles, injunction was sought against the enforcement of an ordinance restricting the territory within which gas works might be erected and maintained, circumstances being alleged tending to show that the real purpose of the ordinance was not a legitimate exercise of the police power but interference with the enterprise of plaintiff, to the consequent advantage of a rival enterprise. In holding that the enforcement of the ordinance against the plaintiff would be an abuse of the police power vested in the municipality this court said:

> "Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged unlawful motives inducing the passage of an ordinance, is not a question necessary to be determined in this case; but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance. This court in the case of Yick Wo v. Hopkins, 118 U. S. 356, held that although an ordinance might be lawful upon its face and apparently fair in its terms, yet if it was enforced in such a

manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts."

Dobbins v. Los Angeles, 195 U. S. 223 (p. 240).

Yick Wo v. Hopkins was again cited and its principle of decision approved, although no occasion was found for applying that principle, in

Bailey v. Alabama, 219 U. S. 219, p. 231.

In the same line of decision with the cases we have here cited is Scott v. McNeal, decided by this court at October term, 1893, on writ of error to the Supreme Court of the state of Washington. The action was ejectment to recover land which had been sold by an administrator, under order of a probate court, in proceedings taken upon the estate of the plaintiff as a (supposed) deceased person, he having been absent from the state and not heard from for a period of more than seven years when such probate proceedings were instituted. The judgment of the Supreme Court of Washington sustained the validity of such sale, holding in effect that such probate proceedings are conclusive upon all persons interested in the estate, including the supposed decedent, notwithstanding the latter was in fact still living. This court reversed that judgment on the ground that its effect was to deprive the plaintiff of his prop-

erty without due process of law. And it was held that the local statute providing for probate proceedings was not intended to confer jurisdiction on the probate court except in the case of a person actually deceased and that the notice for which it provided was not notice to the supposed decedent but only to the persons whose interests in the estate depended on his death. In this regard it was held that the state court had erred in its construction of the local statutes; and to this feature of the decision of this court we desire to call particular attention. In the opinion of this court in that case it was said (referring to this *construction* of the local statute):

> "After giving to the opinion of the Supreme Court of the state the respectful consideration to which it is entitled, we are unable to concur in its conclusion, or in the reasons on which it is founded.
>
> "The fourteenth article of amendment of the constitution of the United States, after other provisions which do not touch this case, ordains, 'nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. Virginia v. Rives, 100 U. S. 313, 318, 319; *Ex parte* Virginia, 100 U. S. 339, 346; Neal v. Delaware, 103 U. S. 370, 397."

Scott v. McNeal, 154 U. S. 34 (45).

That we are justified in attributing particular significance to this feature of the decision in Scott v. McNeal is evidenced by the citation thereof in Chicago etc. R. Co. v. Chicago, where the effect of a decision of the highest court of a state in direct opposition to the provisions of the state constitution was distinctly involved. In that case it was claimed that the plaintiff in error, a railroad corporation, had been deprived of its property without due process of law in that it had been awarded only nominal damages for an easement taken for a public highway across the railroad right-of-way, under a judgment which had been affirmed by the state Supreme Court. The question whether the guaranty of due process in the fourteenth amendment requires just compensation to be made for property to be taken for public use, after elaborate consideration, was decided by this court in favor of that contention. But preliminary to that inquiry this court pertinently observed:

> "It is not contended, as it could not be, that the constitution of Illinois deprives the railroad company of any right secured by the 14th amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its

legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' *Ex parte* Virginia, 100 U. S. 339, 346, 347; Neal v. Delaware, 103 U. S. 370; Yick Wo v. Hopkins, 118 U. S. 356; Gibson v. Mississippi, 162 U. S. 579. These principles were enforced in the recent case of Scott v. McNeal, 154 U. S. 34, in which it was held that the prohibitions of the 14th amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the 14th amendment."

Chicago etc. R. Co. v. Chicago, 166 U. S. 226 (pp. 233, 234).

Counsel for appellees, we apprehend, may take exception to our citation of the two cases last mentioned, as involving only the judgment of the highest court of a state. That objection is completely answered by the reliance expressly placed

upon the latter of these two cases by the decision of this court in Raymond v. Chicago Traction Co., to which we shall next refer. Even apart from its refutation by that decision, we submit that the objection is of no merit.

The judicial department of a state cannot be regarded as in any sense the exclusive organ of state action. It is only one of several independent and co-ordinate departments; and the legislative and executive departments are the more obvious, if not the more often employed, instruments of state action. That it was merely as one of these several equally responsible agencies of the state that the judicial department was regarded in the cases cited is evident from the terms in which the state's accountability for their action under the fourteenth amendment was there stated. In both decisions the language is, that the prohibitions of that amendment embrace all acts of a state's "legislative, executive and judicial authorities." It is true, of course, that the highest court of the state is to be regarded as the final interpreter of its constitution and laws; but it was clearly not in that character that its action was presented for the judgment of this court in either of the cases in question. It could not have been so. For in Scott v. McNeal, as we have seen, this court plainly declared that the judgment of the Supreme Court of Washington had placed an erroneous construction upon the statute of the state. And

in Chicago etc. R. Co. v. Chicago, above cited, the jurisdiction of this court to inquire and determine whether the judgment of a state court was an act of the state contrary to the fourteenth amendment was asserted notwithstanding it was recognized that if the act was of that character it was equally contrary to the constitution of the state. If undeniable violation of the state constitution by an act of its judicial officers,—a judgment of its highest court,—does not take away its character as an act of the state, neither can such violation by the act of any other officer of the state deprive it of the like character, if it be an act which derives its force or effect from the authority with which the state has invested such officer.

> "This must be so or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agencies with power to annul and evade it.'"
>
> Chicago etc. R. Co. v. Chicago, *supra*, (166 U. S. at p. 234).

Raymond v. Chicago Traction Co., above referred to, is in no way distinguishable in its essential facts from the case at bar. It was brought in a circuit court of the United States to enjoin proceedings for the collection of taxes assessed against the complainant railway corporation by the state board of equalization. The material facts in the case were these: The state board of equalization was charged with the duty of assess-

ing for taxation the capital stock of all corporations of certain classes. It made such an assessment of the capital stock of the complainant and hundreds of other corporations—for aught that appeared, all of the corporations subject to its jurisdiction. On this assessment taxes were levied and duly paid by the complainant. Subsequently, however, the courts of the state granted a writ of mandamus requiring the board to make a new assessment for the same year of the capital stock of the complainant and of some twenty-two other corporations, on the ground that the first assessment was based on a fraudulent undervaluation. The re-assessments so required were made and were some twenty times as high as the original assessments. Such re-assessment, however was ordered and was made only on the twenty-three corporations, including the complainant, named in the writ of mandamus; and it left unaffected all the assessments of the hundreds of other corporations in the state subject, under the law, to be assessed in the same manner. The action of the board of equalization in the making of assessments was final, in the sense that the law provided for no appeal, or other direct review of its proceedings by any court or other tribunal. The ground on which the mandamus was granted was that the original assessments were so grossly erroneous as to be, in law, no assessment at all. (See statement of case, 207

U. S. at page 24.) This, if true of the assessments named in the writ, was equally true of the assessments of all other corporations of the same class. Hence the restriction of the mandamus proceedings to certain named corporations was no justification for the failure of the board to apply the same principle and procedure to all corporations in the same class, so that the discrimination which resulted was, at least in legal contemplation, wholly the act of the board, not of the courts granting the mandamus.

Discussing the merits of the claim, made upon these facts, that the action of the state board of equalization in making the assessment under consideration was the action of the state and if carried out would violate the provisions of the fourteenth amendment, this court said:

> "The state board of equalization is one of the instrumentalities provided by the state for the purpose of raising the public revenue by way of taxation. In regard to corporations of the class of which the appellee and the other corporations involved here are members, it is the duty of that board to make an original assessment upon them. From the decision of the board in making such assessment no appeal is provided for, and each decision is therefore conclusive, except as proceedings for relief may thereafter be taken in the courts. As to the assessments of local assessing bodies, the board is one of review, but its decisions are equally conclusive, as in the case of original assessments. Acting under the constitution and laws of

the state, the board therefore represents the state, and its action is the action of the state. The provisions of the 14th amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226. Following the above case, the Federal courts throughout the country have frequently reviewed the action of taxing bodies when, under the facts, such action was in effect the action of the state, and therefore reviewable by the Federal courts by virtue of the provisions of the amendment in question. * * *

"The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the state, through the board. There is here no contention of illegality simply because of assessing these franchises at a different rate from tangible property in the state, *which the state might do*

(Coulter v. Louisville & N. R. Co., 196 U. S. 599), but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for other corporations *of the same class* for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations. The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the constitution of the state in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her, or its property,' was, in this instance, omitted and ignored, *while the board was making an assessment which it had jurisdiction to make under the laws of the state.* This action resulted in an illegal discrimination which under these facts, was the action of the state through the board. Barney v. New York, 193 U. S. 430, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the state. Such is not the case here."

Raymond v. Chicago Traction Co., 207 U. S. 20 (pp. 35, 37).

The ground on which the court thus distinguished the case before it from Barney v. New York, presently to be examined, will be more apparent when the facts of that case are understood. That distinction, as briefly indicated in the latter part of the above quotation, is that in the Barney case the complainant's pleading (as construed by this court in its opinion in that case, 193 U. S.

at pp. 437, 438) made out simply a violation of the state law; while in the Raymond case there was alleged and shown a violation of the federal constitution (clearly indicated in the preceding sentences of the passage above quoted), being a discrimination between persons standing in the same relation to the law, a denial of the equal protection of the laws, which, being accomplished by a state agency acting within its jurisdiction, must be regarded as the act of the state, although it was clearly contrary to the law of the state.

In Barney v. New York, referred to above, suit was brought to enjoin the city of New York, its board of rapid transit commissioners, and the contractors for the construction of a certain subway or tunnel, from proceeding with the construction of the tunnel under the highway adjacent to the complainant's premises, except according to a certain general route and plans, to which complainant had consented. The essential facts of the case and the nature of the question which it involved, appear from the following passages in the opinion of this court:

> "The city acts through the rapid transit board, *which possesses the powers specifically vested.* It is empowered to prescribe the routes and general plan of any proposed rapid transit railroad within the city, and every such plan must 'contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue, or other public place is to be

encroached upon and the property abutting thereon affected.' Consents of the municipal authorities and the abutting property owners to construction on the routes and plans adopted must be obtained, and any change in the detailed plans and specifications must accord with the general plan of construction, and, if not, like consents must be obtained to such change.

"The bill asserted that the easterly tunnel section under Park avenue was not within the routes and general plan consented to, and that the construction was unauthorized. And this is the view taken by the Supreme Court of New York. * * *

"Thus, the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the state of New York within the intent and meaning of the 14th amendment, and the circuit court was right in dismissing it for want of jurisdiction.

"Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. *Complainant's grievance was that the law of the state had been broken,* and not a grievance inflicted by action of the legislative or executive or judicial department of the state; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law. Missouri v. Dockery, 191 U. S. 165; Civil Rights Cases, 109 U. S. 3; Virginia v. Rives, 100 U. S. 313."

Barney v. New York, 193 U. S. 430 (pp. 437, 438).

It will be observed that the complainant in that case had very appropriately made defendants in the suit the contractor and sub-contractor by whom the work was being, or about to be, prosecuted. If he had confined his suit to those individuals, proceeding against them as wrongful trespassers upon his property, he would clearly have been entitled, in the proper court of the state, to the relief which he demanded against them. For under the facts as alleged in his bill they would have been unable to show even color of lawful authority for what they proposed to do. Their contract with the rapid transit board could not have protected them, even supposing it to have called for the construction of the tunnel in the particular place to which the complainant objected, because the proceedings of the board, on which the legality of any contract depended, did not provide for construction at that place, but in an entirely different location. The power of the board to cause the construction of the tunnel in any particular location, as appears from the above quoted statement of the facts, was strictly limited, and conditional upon obtaining the consent to such location by the property owners affected. Borrowing the term employed in the Raymond case, *supra*, it is entirely proper to say that the rapid transit board *had no jurisdiction* to cause the tunnel to be constructed at the place of which complaint was made. Hence their act, if

they attempted such construction, and the act of the defendant contractors, even if directed by the transit board (as to which the bill seemed to leave some question,—193 U. S. at page 432), was not authorized by any law of the state, and was therefore not the act of the state. In this we submit there exists a vital distinction between the Barney case on the one hand and the Raymond case and the case at bar on the other.

The wrongful act of which complaint was made in the Barney case did not derive any of its capacity to inflict injury from any authority conferred upon the wrongdoers by the state. The injury complained of was precisely the same as though the individual defendants had undertaken the construction of the tunnel in the street in question, without any previous attempt, even, of the rapid transit board to provide for a tunnel in that street; and the plaintiff in that case, if he had proceeded in the state courts, would have had no more difficulty in making out his title to relief than if the wrong had been so committed, as a mere private trespass.

The situation was entirely different in the Raymond case, and it is equally different in the case at bar. In the Raymond case, as in this case, the fact complained of is one which derives its power to injure wholly from the fact that it is performed by officers and agents of the state invested with authority to perform acts of that very nature.

While the act was in fact contrary to the legal duty of the state agency in question, it was, as aptly expressed by this court in the Raymond case, one which it had *jurisdiction* to perform. And the complainant in that case, precisely as the complainant in the case at bar, was exposed by the act in question to injury, which it could only escape by resort to the courts, and therein establishing the unlawfulness and invalidity of that act; an act to which, because of the official position and authority of those who performed it, a *prima facie* validity and force was accorded by the law of the state. Such *prima facie* validity and force of a legislative rate regulation we have already shown; those of an assessment for taxes, made by a body invested with the assessing function, (with all the penalties that legally follow non-payment of the tax) are too obvious for discussion.

That this court, in deciding the Barney case, did not intend to lay down a rule which would govern such a case as the Raymond case or the case at bar, is evident from the authorities which were cited in the opinion as sustaining that decision, and those which were distinguished as not applicable. To those authorities we wish now to briefly call the attention of the court.

Missouri v. Dockery (191 U. S. 165) came to this court on writ of error to the Supreme Court of Missouri, to review a judgment denying a

mandamus to compel the state board of equalization to re-assess certain corporations, which the petitioner alleged to have been under-assessed, or not assessed at all. The state court had rendered no opinion in support of its decision, and this court suggested that it might well have been based on questions of pleading or procedure, but further said:

> "However this may be, the petitioner admitted, at the argument, that his own tax was correct, and that he would have had no case under the fourteenth amendment if the companies had been exempted altogether. * * * For the legislature could exempt them, and the question whether it has done so or not is for the state courts to decide in their construction of its acts. Furthermore, if the state could grant a total exemption, it could grant a partial exemption, and if it has done so, *de facto*, through its officers, the petitioner cannot come here on an allegation that the officers acted as they did without the authority of the state. That again is for the state court to decide. The petitioner has no case under the constitution of the United States, and nothing else is open."

In other words, the complaint there was merely that subordinate officers of the state had done, without authority, that which, if done by authority of the state, would not have been prohibited by the fourteenth amendment. It was such a case as would be presented here if complaint were made of the rate ordinance of the defendant city

council solely on the ground that the council did not have authority to pass such an ordinance; and not on the ground that the rates presented thereby were confiscatory.

The *Civil Rights* cases (109 U. S. 3) held simply that congress did not have power, under the fourteenth amendment, by direct legislation, to prohibit the denial by merely private individuals, of equal accommodations in inns, public conveyances and places of amusement: since the acts of such individuals, unsanctioned by any law or authority of the state, could not be deemed the act of the state. The distinction between the enactment by congress of such a prohibition, and its enactment of the prohibition under consideration, and sustained, in *Ex parte* Virginia, *supra*, (100 U. S. 339), a prohibition directed against action of state officers, was pointed out, and the authority of the decision in that case was not at all questioned.

Virginia v. Rives (100 U. S. 313), as we have above shown, turned on the construction of R. S. Sec. 641; and as this court has repeatedly stated, in reference to that case and the other cases in the same group, above discussed, it was there held that the prohibitions of the fourteenth amendment were broader than the terms of the statute, that is, that the statute did not attempt to provide for all of the cases of denial of equal pro-

tection and due process which the amendment prohibited.

Reference is also made in the Barney case to the decisions of this court under the eleventh amendment, "which draw the distinction between acts of public officers, *virtute officii*, and their acts without lawful right, *colore officii*." That distinction has frequently been stated thus:

> "Acts done *virtute officii* are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him; while acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them."
>
> Fuller v. Gates, 40 Or. 543 (546), 67 Pac. 416;
>
> 7 Cyc., pages 401, 402, and citations.

Rightly interpreted, the distinction thus stated may afford a true test for determining whether the act of a state officer is the act of the state, for of course it is not every act done by a state officer which can thus be charged to his state. If he acts entirely outside the scope of his authority, so that his act derives no legal effect or consequence because of his official character, such acts are no more the acts of the state than if the officer held no official position or authority at all. Such, essentially, was the nature of the act in the Barney case. A mere assertion of authority by an officer, or even an attempt to exercise it, is not

enough to establish it. In this connection, however, we must suggest the question, how far it may lie in the mouth of persons who have attempted to exert a particular authority under the state, claiming a lawful right to do so, to stultify themselves by denying their own authority, when the consequences of their act are brought judicially into question. The answer to that question is not material to the point we are now considering, and we leave its discussion to another place.

In further considering the line of cases last referred to, dealing with the eleventh amendment, it is to be borne in mind that the principal question determined therein, namely, under what circumstances a suit against a state officer, on account of acts claimed to have been done by authority of his office, is a suit against the state, is a very different question from that now calling for solution: and that the decisions upon the former question cannot be regarded as authority for the latter.

For obviously, if the act of a state officer could be regarded as the act of the state, under the fourteenth amendment, only in those cases in which a suit against the officer on account of such act would be deemed a suit against the state, under the eleventh amendment, then all jurisdiction of the federal courts under the fourteenth amendment would be at an end. It could not have been intended, in the Barney case, to suggest such a

rule of decision, nor would an examination of the cases decided under the eleventh amendment and of the reasoning on which those decisions have been founded, tend to support such rule. This whole subject and the long line of decisions relating to it were exhaustively reviewed by this court in *Ex parte* Young, *supra,* and the jurisdiction of the federal courts to restrain action of state officers as being action of the state under the fourteenth amendment, was emphatically stated to exist in that and similar cases, while at the same time it was asserted, with equal emphasis, that such a suit was not one against the state within the meaning of the eleventh amendment. It would be idle for us to attempt to add anything to that discussion.

Ex parte Young, 209 U. S. 123, pp. 149-160.

Ex parte Virginia (100 U. S. 339) has been already discussed by us; and with all deference to the learned, and now lamented, author of the opinion in the Barney case, we think it must be conceded that this court did *not* consider that it was dealing, in *Ex parte* Virginia, with the judgment of a court. For, as we have seen, it was there held that the act in question was not judicial, but merely ministerial. This court, however, in the Barney case, was undoubtedly justified in regarding *Ex parte* Virginia as distinguishable

from the case before it, for reasons sufficiently indicated in our former discussion.

An examination of the opinions in the three cases cited from the inferior federal courts, on page 440 of the opinion in the Barney case, will disclose that those opinions do not state the facts involved sufficiently to determine their exact bearing on the present question. So far as can be gathered from those opinions, the cases were of substantially the same character as Missouri v. Dockery, *supra, i. e.,* cases in which the acts of the state officers complained of were alleged to be unauthorized by state law, and were claimed, for that reason, to be a denial of equal protection of the law, contrary to the fourteenth amendment; but as clearly shown by this court in the Dockery case, the act of a state officer which is unauthorized by the law of the state cannot be such a violation of the fourteenth amendment, unless it is such an act as would be a violation of that amendment, when done under authority of the state.

With reference to the case of Scott v. McNeal, *supra,* and Chicago etc. R. Co. v. Chicago, *supra,* it will be observed that they are referred to in the Barney decision as cases in which "judgments of the highest judicial tribunals of the state were treated as acts of the state," and it is further remarked that "no question of the correctness of that view arises here." This recognition of the

decision in the two cases mentioned is significant of the ground of decision in the Barney case, since the principle of decision in those cases, as we have seen, and as this court subsequently held in the Raymond case, is applicable to the action of other state officers as well as to the judgments of courts.

So the comment upon the case of Reagan v. Farmers L. & T. Co. (154 U. S. 362) is likewise significant. For while the jurisdiction in that case rested on diversity of citizenship, yet it was also there held that the adoption of a confiscatory schedule of rates by a state railroad commission was a violation of the fourteenth amendment; and as to that feature of the Reagan case, the opinion in the Barney case observes:

> "And as the establishment of rates by the commission was the establishment of rates by the state itself, and the determination of what was reasonable was left to the discretion of the commission, their action could not be regarded as unauthorized, even though they may have exercised the discretion unfairly."

Of similar significance is the observation of the court in the Barney case upon the case of Pacific Gas Improve. Co. v. Ellert, decided by Mr. Justice McKenna, while circuit judge. The complainant there sought to enjoin a city board of supervisors from proceeding with the improvement, as a street, of a tract of submerged land adjoining complainant's premises, which fronted on

navigable waters: it being alleged that the complainant would thus be deprived of property, viz., riparian rights of access, without due process of law. The defendants rested their claim of authority on an act of the legislature of the state, purporting to dedicate the premises as a street. This legislation the complainant assailed as unconstitutional and void. On demurrer, and in opposition to motion for preliminary injunction, it was argued that as the defendant board only had authority to improve streets lawfully dedicated or established as such, it would follow that if the complainant's position was correct, the defendants had no authority to so improve the property in question, and hence their act could not be the act of the state. In the opinion of the learned circuit judge, this contention was rejected as being contrary to the decision of this court in *Ex parte* Virginia, *supra.*

It may be appropriate here to notice one or two of the later decisions of this court, in which the Barney case has been cited on the question of jurisdiction.

In one of these cases, Siler v. Louisville & N. R. Co., an order adopted by a state railroad commission was attacked by a corporation of that state on several grounds, including: (a) that the act creating the commission and defining its powers was in conflict with the federal constitution, because, among other reasons, it would impair

the obligations of a contract between the state and the complainant; (b) that the order in question was beyond the powers of the commission as defined by the act, it being an omnibus order reducing all rates on all railroads in the state, after a hearing as to alleged unreasonableness of all such rates, and not of any particular rate; and (c) that the rates as prescribed by such order were confiscatory and violative of the fourteenth amendment. There being no diversity of citizenship, objection to the jurisdiction was made on the ground that the allegation that the order was beyond the legal powers of the commission, demonstrated that it could not be the act of the state, or open to attack under the fourteenth amendment; and the Barney case, *supra,* was cited in support of this objection. For the purposes of the decision of that case, however, this court disposed of the objection thus:

> "If the averment as to the invalidity of the order of the commission were the only ground upon which a federal question was founded, and if the bill alleged that the order was invalid because it was not authorized by the state, either by statute or in any other way, the objection might be good; but the bill sets up several federal questions."
>
> Siler v. Louisville & N. R. Co., 213 U. S. 175 (page 192).

It will be noticed how very guarded was the concession thus made in favor of the objection

presented in that case: it was only conceded that it "might" be good, and this only *"if the bill alleged* that the order was invalid *because* it was not authorized by the state." Perhaps the court had in mind the possibility, even in such a case, of framing a bill to attack such a rate regulation, both on the ground that it was beyond the lawful powers of the body enacting it, and at the same time on the further ground that, if within the authority conferred on the body by the state, the order was nevertheless confiscatory, and therefore violative of the federal constitution. Such a bill was impliedly sanctioned in certain of the decisions cited in the Siler case (213 U. S. at page 191) to the rule that state and federal questions may be united in one bill, and the case disposed of on the state questions alone, although the jurisdiction depends on the federal questions. Such a double fronted attack has also been apparently sanctioned by other decisions of this court.

See:

Hamilton Gas Co. v. Hamilton, 146 U. S. 258;

Manigault v. Springs, 199 U. S. 473;

Michigan C. R. Co. v. Powers, 201 U. S. 245.

But whatever might be held as to the propriety of such a bill, it is clear that what this court said in the Siler case with regard to the objection to

jurisdiction under the fourteenth amendment, had reference solely to an allegation such as was there made that the action in question was wholly beyond the delegated power of the body attempting to take it. That allegation showed a want of jurisdiction equivalent to that which was exhibited by the bill in the Barney case.

In the remaining case, Memphis v. Telephone Company, in which Barney v. New York has been cited on this point, a like lack of authority,—an absence of jurisdiction,—was alleged by the complainant. There an injunction was sought against a municipal ordinance regulating telephone rates and the bill alleged that the defendant city had no power under its charter to enact such an ordinance, although it was also alleged that the rates prescribed were confiscatory. The majority of this court were of the opinion that the allegation of confiscatory character was to be construed, in harmony with the allegation of total want of authority to prescribe rates, as referring only to the state constitution, which also expressly forbade deprivation of property without due process of law; for no mention was made in the bill of the federal constitution, and there had been no attempt to frame the bill so as to give it a double aspect (although it was conceded that such a double-pointed attack might be permissible). It was concluded that the case was not one in which a state statute was "claimed" to be in contraven-

tion of the federal constitution, within the meaning of the act of congress regulating the respective jurisdictions of this court and the circuit court of appeals. (Three members of the court, however, dissented, holding that the "claim" required by the statute was sufficiently shown by the opinion of the trial court, which based its decision of the case on the invalidity of the statute under the federal constitution.)

Memphis v. Telephone Co., 218 U. S. 624.

It is worthy of observation, in the consideration of the last cited case, that neither in the prevailing nor in the dissenting opinion was there any suggestion that federal jurisdiction in the case was defeated by the fact that the state constitution also prohibited deprivation of property without due process of law. And certainly there is nothing in that case or in the Siler case, *supra*, which in any way qualifies the rule affirmed and applied in the Raymond case, and the prior decisions of this court, above cited.

OPINION OF THE COURT BELOW.

This court will have discovered from reading the opinion of the learned district court in this case [Rec. p. 41] that it considered that its decision must be governed by certain prior decisions of the court of appeals of the ninth circuit; and we shall now discuss those decisions, and show, we believe, that they do not decide our question.

The first of such decisions was rendered in an action brought by one street railway corporation against another to enjoin the construction and operation by the latter of a second street railway in the same street occupied by the complainant. There was no diversity of citizenship, and a federal question was attempted to be set up by the following allegation, quoted in the opinion of the court of appeals:

> "That said alleged ordinance No. 22,933 was granted by the city of Seattle to the said the Seattle Electric Company, defendant herein, in violation of the terms and conditions of the franchise now owned and used by the complainant company evidenced by ordinance No. 15,919, and that said alleged ordinance No. 22,933 was obtained by said the Seattle Electric Company in fraud of the rights of complainant, and granted illegally without right by the city of Seattle, and by the terms of said alleged ordinance the property, rights, and privileges enjoyed by this complainant will be taken from it without due process of law and in contravention of the constitution and laws of the United States, and that said alleged ordinance is without authority in law and is null and void and of no force and effect."
>
> Seattle Electric Co. v. Seattle etc. Ry. Co., 185 Fed. 365 (p. 369).

But the complainant's bill in that case further showed that its own franchise contained an express provision that the rights thereby granted should not be deemed exclusive, and that the city

of Seattle therein reserved the right to grant to others, or to exercise itself, the right to construct and operate "a line or lines of railway" over the same streets; and furthermore, the ordinance granting the defendant's franchise, which the complainant assailed, contained an express provision that before any railway tracks should be constructed thereunder "in any location where any person or company [is] entitled to compensation for damages occasioned thereby," such damages must be first "settled according to law." Accordingly the circuit court of appeals well said:

> "Manifestly the ordinance is not in conflict with the constitution of the United States. Instead of taking complainant's property without due process of law, it expressly provides that it shall not be so taken. There is no right claimed under it by the defendant contravening any rights secured to the complainant under the constitution of the United States. This proposition requires no discussion. It appears plainly and distinctly upon the face of the ordinances."

This clearly disposed of the case. But the court of appeals, in the portion of its opinion by which the court below considered itself bound, went on to say that there appeared to be another ground of objection to the jurisdiction of the circuit court, which it stated thus:

> "If it should be conceded that in some view of the ordinance and defendant's action under color of its provisions there would be a taking of complainant's property without

due process of law, still it would not follow that the circuit court had jurisdiction of the case unless the ordinance in that aspect would be the supreme law of the state. The supreme law of the state is the constitution of the state; and that document provides, in article 1, section 3, as does the fourteenth amendment to the constitution of the United States, that:

"'No person shall be deprived of life, liberty, or property without due process of law.'

"Under this provision of the state constitution the ordinance would be as invalid as under the federal constitution. It would not be a state law. It would be with respect to the former, as the complainant charges in its complaint with respect to the latter, 'without authority in law, null, and void, and of no force and effect.' The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its constitution. If, however, it should turn out that we are mistaken in this respect, the complainant will have his remedy in an appeal from the highest court of the state to the supreme court of the United States."

Seattle Electric Co. v. Seattle etc. Ry. Co., 185 Fed. Rep. 365 (p. 372).

Now, if the nature and effect of the ordinance there in question are borne in mind it will appear, we think, that the ground of decision thus stated by the circuit court of appeals, while possibly correct as applied to the case before it, has no application to such a case as that at bar. The ordinance complained of in the Seattle case was mere-

ly a grant of permission to construct and maintain a railway in the streets of the city. If, as the complainant alleged, this ordinance deprived it of property without due process of law, it was void under the state constitution and, as stated in the language of the bill quoted by the circuit court of appeals, it was *"of no force and effect."* It was a mere nullity. It constituted no license to the defendant for any invasion of the property or rights of the complainant. If the defendant attempted any such invasion it would be, notwithstanding the ordinance, a mere trespasser, and the complainant could treat it as such, because the ordinance was void.

It must be further observed that the defendant in that suit was a private corporation holding no office and exercising no authority under the state of Washington, or even under the city of Seattle. The bill in that case showed no more reason or excuse for a resort by the complainant to the federal court for protection against the wrongful acts of the defendant in that case than if the same acts had been done or threatened by the defendant without the city council having previously gone through the form of enacting the void ordinance. In no possible view of the case, as it was stated in the complainant's own bill, could such acts of the defendant be regarded as acts of the state of Washington. They did not derive any force, or

capacity to injure the complainant, from any act of the state or of any agency of the state.

The features of the case at bar which distinguish it radically from the Seattle case we have elsewhere discussed, and the briefest mention here will suffice. The ordinance complained of in our case prescribes a schedule of rates to be charged by the complainant, which rates are, by the law of the state, *prima facie* valid and binding. This ordinance requires no judicial action or sanction to make it effective and operative. On the contrary, complainant can escape from its effect only by judicially establishing its nullity because of the confiscatory character of the rates prescribed. Moreover, pending such judicial annulment, the complainant must either conform to these rates or run the risk of penalties which may confiscate all its property in fines, and subject all its officers and agents to years of imprisonment; and the further risk, we may add, of forfeiting its franchises and charter for violating the laws of the state which created it and granted its franchises. And all of these consequences attach to this ordinance because, and solely because, the state of California has invested this city counsel with the legislative power of prescribing telephone rates and the legislative power of making the violation of its ordinances a misdemeanor, punishable by fine and imprisonment. If the state of California had *not* vested such powers in the council, then, but only

then, its ordinance would have been as nugatory, and as devoid of capacity to injure the complainant, as the ordinance involved in the Seattle case.

In support of its *opinion* in this Seattle case, the circuit court of appeals relied on the case of Hamilton Gas Co. v. Hamilton (146 U. S. 258), where a city ordinance providing for the erection of municipal gas works was attacked as being beyond the corporate powers of the city (but also as being, if authorized, an impairment of contract obligations between the city and the complainant). This court there said:

> "A municipal ordinance *not passed under supposed legislative authority* cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts."

But the Court of Appeals seems to have overlooked a very important feature of the Hamilton case; namely, that this court there *sustained* the jurisdiction of the Circuit Court over the case, as presenting a federal question, although the complainant itself had thus denied the authority of the defendant city, under the law of the state, to take the action in question; this, for the reason that the defendant city did not *concede* its want of authority but instead claimed to have the authority in question under a statute of the state, giving color to that claim. We respectfully submit that this reasoning is also pertinent to the case at bar,

where the defendants have asserted and assumed to exercise the authority of the state in question, and sustains the federal jurisdiction. And we are constrained to add that this reasoning seems to us contrary to the theory advanced in the opinion of the circuit court of appeals in the Seattle case, by which the learned court below considered itself controlled in the case at bar.

The opinion in the Seattle case also cites a passage from 5 Ency. U. S. Sup. Ct. Rep., p. 545, to the effect that "the doctrine here is that the aggrieved party must first invoke the aid of the state courts to remedy the acts of state officers done without authority of, or contrary to, state law." The class of cases referred to in this passage is evident from the preceding sentence, which reads: "In such cases the grievance is simply that the state law has been broken, and not that the state has inflicted a wrong through its legislative, executive or judicial department." And it is further evident from the cases referred to in the notes to the passage quoted, which are: Barney v. City of New York, *supra;* Virginia v. Rives, *supra,* and Missouri v. Dockery, *supra,*— all of which we have sufficiently discussed, and shown that they are not analogous to the case at bar. In the next previous note on the same page of the work cited, the case of Owensboro Waterworks v. Owensboro (200 U. S. 38) is also cited, which answers exactly to the description given in

the sentence last above quoted, viz., a case where "the grievance is simply that the state law has been broken."

The purport of the decision in the Seattle case is further shown by the explanation thereof in the subsequent decision of the same court in San Francisco v. United Railroads (190 Fed. 507), where injunction was sought against the construction and operation of a municipal street railway by the defendant city. The claim of the plaintiff there was that by the terms of its franchise grant, and of a statute of the state concurrently in force, there had been created a contract in plaintiff's favor limiting the extent, to which any other street railway might be authorized to occupy the same streets, to a certain number of blocks; and that the proceedings of the city for the construction of the proposed municipal railway amounted to a law of the state impairing the obligation of such contract, because such proceedings provided for the construction of a railway for a greater number of blocks than the prescribed limit. But the statute of the state on which the complainant relied as so restricting subsequent railway franchise grants was still in force; so that, if the complainant's contention as to the application of the statute was correct, the proceedings of the municipality, so far from being authorized by the state, were in direct violation of its statute governing such proceedings. Hence

the court of appeals rightly held that, under the facts of that case, such municipal proceedings could not be regarded as the act of the state.

In truth, we do not see upon what theory it can be said that the proceedings of the city council and electors of San Francisco, looking to the construction and operation of the municipal railway there in question, can be regarded as the exercise of either legislative or any other authority of the state, unless they can be deemed analogous to the granting of a franchise by the city to a private corporation. If the action involved had actually been of that character,—if the city had granted a franchise to a private corporation over the same route which the municipal railway proposed to occupy, such grant necessarily would have been of no force or effect as to so much of the route as exceeded the statutory limit, and it would not have given the grantee any legal right or actual power to take possession of the street occupied by the complainant within the prohibited limits. As to that portion of the franchise the grant would have been a mere nullity, and any attempt by the grantee to take possession of such portion of the route would have been a mere naked trespass, without color of legal right.

It is of no consequence that the city had been granted the charter power to construct or acquire, and operate, a municipal street railway. Manifestly such a charter provision could no more au-

thorize interference with a vested franchise right than it could the forcible taking of any other privately owned property. Neither can the exercise of such a charter power be regarded as an exertion of the authority of the state, any more than the exercise of the same power by an ordinary railway corporation could be so regarded.

The proceedings of the municipality in the San Francisco case, therefore, to the extent that they interfered with the rights of complainant, were a mere unlawful trespass, and like the action of the private railway corporation under the ordinance attacked in the Seattle case, they derived no force, or capacity to injure the complainant, from any legislative or other act of the state. The city of San Francisco, in attempting to construct and operate a municipal railway, was not in any sense acting as the agent of the state, or exercising any authority or power of the state, but merely one of its own corporate powers. And if its action was a wrong to the complainant, as it claimed, the law of the state afforded the municipality no more immunity than any other wrongdoer.

If such action of a city as that sought to be enjoined in the San Francisco case could be said to be the act of the state, then the act of a private railroad corporation in attempting to take forcible and wrongful possession of property wanted for its roadway could with equal propriety be said to be the act of the state, merely because the state

had conferred upon such corporation its organic capacity, and its charter power to construct a railway.

Hence the San Francisco case bears a close analogy to the case of Dawson v. Columbia etc. Co. (197 U. S. 178), cited in the opinion in the San Francisco case, where proceedings of a defendant city for the construction of waterworks were sought to be restrained as impairing the obligation of a contract with the water company (on whose behalf the suit was prosecuted by its mortgagee) to take and pay for a water supply. This court observed that the injury complained of amounted merely to the refusal of the defendant city to perform its contract and that, "the mere fact that the city was a municipal corporation does not give its refusal the character of a law impairing the obligation of contracts or depriving the citizen of property without due process of law."

The case of Louisville v. Telephone Co. (155 Fed. 725), also cited in the San Francisco case, is another clear example of a total want of authority in the subordinate body whose act was in question. The bill in that case sought to enjoin the enforcement of a city ordinance, purporting to prescribe telephone rates, as being confiscatory, and also as impairing the obligation of a contract; but it was distinctly alleged in the bill itself that the defendant city had not been vested with any

authority to enact such an ordinance. (No suggestion appears to have been made in the case that the bill might have been regarded as setting up independent grounds of attack, one presenting a state and the other a federal question.) In denying jurisdiction the court of appeals said:

> "If the state has conferred authority upon the municipality to establish and enforce reasonable rates for telephone service, then the establishment of rates under this power would be the establishment of rates by the state itself. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362. But this is just what the bill charges has not been done, thereby depriving the circuit court of every foundation for its jurisdiction as a suit arising under the constitution or laws of the United States."
>
> Louisville v. Telephone Co., 155 Fed. 725 (p. 729).

In view of the authorities thus cited by the circuit court of appeals in the San Francisco case the principle on which it proceeded is apparent, and no doubt is left as to the significance of its statement concerning the prior decision in the Seattle case, that it was "in line with these authorities." But it is clear, we submit, that all the cases in that line of decision present an essentially different state of facts from any of the cases in the line of decision which we have above invoked, commencing with *Ex parte* Virginia, *supra* (100 U. S. 339), and culminating in

Raymond v. Chicago Traction Co. (207 U. S. 20). It is likewise clear, we submit, that the case at bar falls within the latter class and not the former.

We respectfully submit, therefore, that the learned court below was overscrupulous in feeling constrained by these decisions of the circuit court of appeals to deny federal jurisdiction in the case at bar; that those decisions, when fairly read, do not require the construction which was thus impliedly placed upon them. Neither the facts in those cases, nor the reasons on which the court essentially founded its decisions therein, serve to bring those cases into analogy with the present case; and we question if we have not been at unnecessary pains to establish the points of difference.

The only distinction which the learned opinion of the district court has suggested between the case at bar and Raymond v. Chicago Traction Co., *supra*, is that the latter case involved the action of an agency created for state purposes, while here the questioned action is that of a municipal corporation which, it is said, "does not act in the name of the state and is not created for general state purposes but purely local needs." [Rec. p. 43.] Here again, though with the most sincere respect for the opinion of the learned court below, we must submit that it has allowed its solicitude to follow the precedents of its immediately su-

perior jurisdiction to obscure its view of the principles involved.

We further submit that no tenable ground can be found in the terms or intent of the fourteenth amendment, or in the decisions of this court construing and enforcing it, for drawing any distinction between the different classes of agencies which the state, by its legislative power, may create. A distinction, indeed, exists between the state legislature and the subordinate agencies to which it may delegate authority. The latter can act only by virtue of such delegation. But in this regard no difference is perceived between the board of equalization, created for a specific purpose, and with limited powers, which was before the court in Raymond v. Chicago Traction Co., *supra,* and the municipal corporation which is defendant in the case at bar. Each alike exercises within the sphere of its appointed jurisdiction the power of the state. It was solely because of the power conferred upon them by the state that either was able to work the injury complained of in these respective suits. And surely neither of these agencies had any greater license than the other to violate the constitution of its state.

Further, we respectfully submit that whether in a given case it can be said that a municipal corporation does or does not act in the name of the state depends upon the character of the act done, or of the power which is exerted in the doing

of it. It may well be said, as we have endeavored to show, that the threatened action of the municipality which was involved in the case of San Francisco v. United Railroads would not have been, even if valid, an action in the name of the state, nor the exercise of a power of the state. We question if the same could be said of the action of the city which was under discussion in the Seattle case, namely, the granting of a street railway franchise; but that action, as we have pointed out, was only indirectly involved. The injunction there sought was against acts of a private corporation, and the case could not be brought within the fourteenth amendment unless, at least, such action had the sanction of some law of the state (even supposing that that would be sufficient to make a case under the amendment). And as we have tried to show, the ordinance of the city did not constitute such sanction, in the first place because it expressly reserved from the effect of the franchise grant any previously existing rights of the character claimed by the complainant; in the second place because, if the ordinance had attempted to authorize interference with such existing rights it would have been beyond any legislative power which the state had conferred upon the city.

But certainly, we submit, it must be granted that in taking such action as is involved in the case at bar, namely, the prescribing of public utility rates,

the city acts in the name, and exercises a power, of the state. The prescribing of rates has always been recognized as a legislative power of the state itself which could be exercised by subordinate bodies only through a delegation of the state's power. This is implied, indeed, in many of the very cases cited in these decisions of the court of appeals which we have been reviewing. It is well settled that this power is not among the inherent or implied powers of a municipal corporation, but must be expressly delegated by the state to authorize its exercise by a municipality.

Dillon, Mun. Corp. (5th Ed.), Sec. 1325.

The sovereign nature and high importance, politically, of this power to regulate rates are testified, in a long line of decisions, by the jealousy exhibited by this court in scrutinizing, and frequently rejecting, the claim that a state legislature had contracted away the power, or had authorized such a contract to be made by a subordinate body to which the rate regulating power had been delegated. Most of the preceding cases on this point were cited by this court in a recent decision (delivered in a case arising between the parties to the present litigation), in which it was said:

> "The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service, is among the powers of government, is legislative in its character, continuing in its

nature, and capable of being vested in a municipal corporation. * * *

"But for the very reason that such a contract has the effect of extinguishing *pro tanta* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

Home Telephone & Tel. Co. v. City of Los Angeles, 211 U. S. 265 (271, 273).

Clearly, then, in enacting the ordinance complained of here, prescribing the rates to be charged to the public by the complainant for telephone service, the defendant city was exercising one of the powers of the state, which had been duly delegated to it. If there had been no previous delegation of that authority then, indeed, our case might fall in the same class with the decisions of the circuit court of appeals cited in the opinion of the learned court below. But that delegation of authority, about which no question exists in this case, plainly and radically distinguishes our case from those decisions and from all of the cases which have been relied on in support of the defendants' objection to federal jurisdiction in this case.

The exercise of such a delegated power, though injuriously, is one thing; and the attempt to exercise a power not given—one purely *ultra vires*—is quite a different thing.

We confidently submit, therefore, that the original jurisdiction of the federal courts in such a case as that at bar is fully sustained by the principle of decision announced by this court in *Ex parte* Virginia, *supra* (100 U. S. 239), and the several cases above cited approving and following that decision, and particularly the case of Raymond v. Chicago Traction Co., supra (207 U. S. 20); and that these principles are not qualified, nor their application to the case at bar made doubtful by any other decision of this court, or of the lower federal courts.

V.

The Defendants Having Asserted Their Authority to Enact and Enforce the Rate Regulation Here in Question, and Admitting Their Intention, Unless Restrained, to Continue its Enforcement, are Estopped to Question Their Own Authority In the Premises, for the Sole Purpose of Compelling Complainant to Litigate that Question in the State Courts.

It will not have escaped the notice of this court that in every one of the cases relied on in support of the defendant's objection, and which we have above reviewed, the pleadings of the complainant itself alleged the lack of state authority for the acts complained of. Of precisely opposite character is complainant's bill in this case, which affirmatively alleges the delegation of authority by

the state to the defendant city to prescribe the rates to be charged by complainant and other public utility corporations. [Bill, Par. VI, Rec. fol. 9.] This consideration alone, we submit, is sufficient to distinguish our case from those which are supposed to be adverse to our contention. At this point we call attention again to the language above quoted from the decision of this court in Siler v. Louisville & N. R. Co., in which it was said that a similar objection to the jurisdiction in that case might be good "*if the bill alleged* that the order was invalid because it was not authorized by the state."

> Siler v. Louisville & N. R. Co., 213 U. S., at p. 192.

We also call attention again to what we said before concerning the decision of this court in Hamilton Gas Company v. Hamilton, where it was said:

> "We sustain the jurisdiction of the Circuit Court because it appears that *the defendant grounded its right* to enact the ordinance in question, and to maintain and erect gas-works of its own, upon" a statute of the state —the construction of which was, apparently, a principal dispute between the parties.
>
> Hamilton Gas Co. v. Hamilton, 146 U. S. 258, p. 266.

Furthermore, we urge the court to consider the attitude in which defendants place themselves be-

fore the court by making this objection. In all their conduct and dealings with the complainant, in respect to the matters in controversy, before this suit was commenced, the defendants asserted the authority of the city of Los Angeles by its council to enact the ordinance in question. The fact of such conduct on their part clearly appears from the allegations of the bill, which their plea in effect admits. And they likewise admit their intention to enforce that ordinance against the complainant (unless restrained by the court) even by the means, if necessary, of criminal prosecutions for its violation.

Yet in the face of all this, defendants insist, in support of their objection to the jurisdiction of the court below, that the complainant must go into the courts of the state and there controvert the authority of the defendants, which they themselves have so asserted, and which they will, of course, seek to maintain in any such action which may be brought in the state courts. Thus, if their objection here prevails, defendants will have first asserted their authority in their every act prior to the commencement of this suit; then, in this suit, raised the question of that authority, which question the complainant was willing to waive; and lastly, having forced complainant to go into the state courts and contest their authority, defendants will again affirm that authority, and do their utmost to maintain it.

This is evidently not the ordinary case of a defendant, accused of wrongdoing, who is allowed to object to the jurisdiction of the court to redress that wrong while he expressly or tacitly admits having committed it. The complainant here alleges a particular wrong on the part of the defendants, namely, their violation of the federal constitution. The defendants say, in effect, that they have not committed that offense, but that they have committed another, namely, a violation of the state constitution; and that complainant must pursue them in the state courts for any redress against such latter wrong. But if their plea is allowed, and the complainant compelled to sue them in the state courts, defendants will then change their position again, and deny that they have committed any such violation of the state constitution.

We earnestly submit that to permit a defendant to pursue such a course subverts the ends of justice. That no person or body of persons who have, out of court and prior to suit, asserted and assumed to exercise any official authority to the injury of another (and which could not occasion any injury unless they were able to so exercise such authority) ought to be heard in court to deny or question that authority, and thereby prevent the granting of redress for such injury.

In this aspect of the case at bar, it is, we sub-

mit, within the principle declared by this court in Daniels v. Tearney, where it was said:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself, for his benefit, of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect."
>
> Daniels v. Tearney, 102 U. S. 415. (p. 420.)

If we are right in this view, it is an end of defendants' objection to the jurisdiction here, regardless of all our other contentions,—and we submit that it must be so held.

VI.

Federal Jurisdiction to Grant Relief in a Given Case is Not Defeated by the Possibility of Obtaining Like Relief in the State Courts. The Suitor Cannot be Denied his Choice of Forum.

It may possibly be suggested, in answer to certain of the arguments we have heretofore advanced, that the evils which we have shown inevitably follow from the enactment of a rate regulation under an appropriate delegation of legisla-

tive authority, especially where the violation of such regulation is made a penal offense, might be avoided by bringing an equitable action in the state courts, seeking such an injunction as is here prayed by complainant's bill; and that such relief should be sought in the state courts, followed by an appeal to this court if it should be denied.

The same contention, in effect, was made in Willcox v. Consolidated Gas Co., a case of like impression, and was disposed of by the opinion of this court as follows:

> "At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by counsel for the appellants, the public service commission, in their brief in this court. They assume to criticise the court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (Cohen v. Virginia, 6 Wheat. 264, 404), and, in taking it, that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which, by law, brings the case within the jurisdiction of a federal court. The right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied. *Re* Metropolitan R. Receivership,

208 U. S. 90-110; Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210. In the latter case it was said that a plaintiff could not be forbidden to try the facts upon which his right to relief is based before a court of his own choice, if otherwise competent. It is true an application for an injunction was denied in that case because the plaintiff should, in our opinion, have taken the appeal allowed him by the law of Virginia while the rate of fare in litigation was still at the legislative stage, so as to make it absolutely certain that the officials of the state would try to establish and enforce an unconstitutional rule.

"The case before us is not like that. It involves the constitutionality, with reference to the federal constitution, of two acts of the legislature of New York, and it is one over which the Circuit Court undoubtedly had jurisdiction under the act of congress, and its action in taking and hearing the case cannot be the subject of proper criticism."

Willcox v. Consolidated Gas Co., 212 U. S. 19 (40).

The practical importance, and necessity, of preserving this right to choose the forum in cases of the present character were clearly set forth in Prentis v. Atlantic etc. Co. (cited in Willcox v. Gas Company, *supra*). Speaking by Mr. Justice Holmes, this court there said:

"If the railroads were required to take no active steps until they could bring a writ of error from this court to the supreme court of appeals after a final judgment, they would come here with the facts already found against them. But the determination as to

their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two,—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise competent. 'A state cannot tie up a citizen of another state, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.'"

Prentis v. Atlantic Coast Line Co., 211 U. S. 210 (228).

As supporting this doctrine, the court in the Prentis case cited several of its previous decisions, including:

Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 391;

Smyth v. Ames, 169 U. S. 466, 517;

McNeill v. Southern R. Co., 202 U. S. 543;

Ex parte Young, 209 U. S. 123, 165.

In some of the above cited cases, it is true, there was diversity of citizenship to support federal jurisdiction. Whether this was so in all of the cases disposed of by the opinion in Prentis v. Atlantic etc. Co., *supra*, is not clear to us from the report. But the point is immaterial, since this

court, in Willcox v. Gas Co., *supra,* expressly declared the same principle applicable to jurisdiction dependent on the nature of the controversy.

Recognition by the court of the same considerations concerning the nature of the issues to be determined in such a case as the present was likewise shown in the opinion delivered in *Ex parte* Young, just above cited, portions of which we have already quoted. See, particularly, 209 U. S., at pp. 147, 148.

It is readily apparent from these considerations that if the jurisdiction of the federal courts to enforce the fourteenth amendment in cases of the present impression were restricted to a review of the judgments of state courts on writ of error to this court, the practical effect would be to make the state courts the final judges of what should constitute due process in the legislative enactment of rate regulations. Such a result would be plainly contrary to the terms and intent of the federal constitution. For that instrument, while it expressly declared itself to be "the supreme law of the land," and further declared that "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding," it did, at the same time, make specific provision for courts of the United States, and declared that their "judicial power" should extend to "all cases in law or equity aris-

ing under this constitution" and the laws of the United States.

This is manifestly, we submit, just such a case as Chief Justice Marshall, with characteristic foresight, anticipated would occur unless a federal constitution were construed to give the federal courts jurisdiction of a case involving a federal question, although such case might also involve state questions. For, speaking for this court in Osborn v. Bank, he said:

> "On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law; * * * and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will."
>
> Osborn v. Bank, 9 Wheat. 738, p. 822.

In another of his illuminating decisions Chief Justice Marshall, speaking for this court, had occasion to discuss the objects which the federal constitution intended to secure by this creation of a national judiciary. While these observations were made with special reference to the particular question then before the court, namely, —whether the presence of a state as a party ex-

cluded the jurisdiction of this court over a case otherwise within its constitutional cognizance,—they are of universal application to questions of federal jurisdiction under the constitution and they have always been so treated in subsequent decisions. We shall therefore conclude our argument on this point by briefly quoting from that leading case:

> "The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases, of every description, arising under the constitution or laws of the United States."
>
> "When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of congress."
>
> "The evident aim of the plan of the national convention is, that all the causes of the

specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union."

Cohens v. Virginia, 6 Wheat. 264 (382, 387, 420).

VII.

Although the Constitution of the State Prohibits Deprivation of Property Without Due Process of Law in the Same Terms as the Federal Constitution, the Allegation that an Act is Contrary to the Federal Prohibition is Not an Allegation that Such Act is Contrary to the State Prohibition. The Assumption, Implied in Defendants' Contention, that the Two Constitutional Prohibitions are Identical in Operation and Effect is Contrary to Historical Fact.

Thus far in our argument we have granted the assumption, necessarily involved in the contention of defendants, that the bill of complaint in this case must be regarded as showing that the action of the defendants which is sought to be enjoined will violate the guaranty of due process in the state constitution. We propose now to show that this assumption is not correct: that the bill does not exhibit any such violation of the state constitution, and that consequently there is no foundation in the case for the defendants' objection to federal jurisdiction thereof, and that such objection cannot be sustained, even though every rea-

son which we have hitherto advanced against it should fail.

There have been a very great number of cases in this court, which have come here from the highest courts of the several states whose constitutions contain a guaranty of due process, in which cases this court has held legislative or other acts of a state to be wanting in due process of law within the purview of the fourteenth amendment, where the same acts had been held by the state courts not to be wanting in due process under the state constitution. Every such case exemplifies our contention that, as a matter of historical fact, a state guaranty of due process is a thing entirely distinct from the federal guaranty, and that a violation of one is not necessarily a violation of the other. We shall not undertake to cite any considerable number of such cases, but we desire to call the court's attention to at least one which involved the same sort of state action as that here in question, and has, besides, a special bearing on our present contention.

In Chicago, etc., Ry. Co. v. Minnesota, which came here on writ of error to the Supreme Court of Minnesota, that court had construed an act of the state legislature as making the rates prescribed by a state railroad commission conclusive against any attack in the courts, and had held such an act, and an order of the commission made thereunder, valid and constitutional against the

specific objection that it deprived the railroad company of its property without due process of law. The action was mandamus, by the commission, to compel a railroad company to conform to the rate prescribed, to which the company sought to interpose the defense that the prescribed rate was unreasonable and would not afford fair or just compensation; which it was not permitted to do.

State v. Chicago, etc., Ry. Co., 38 Minn. 281 (pp. 287, 296-8).

In reviewing that judgment, this court did not consider itself at liberty to set aside the construction thus given to the act by the state court: but it held that, if so construed, the act violated the guaranty of due process, as well as of equal protection of the laws, under the fourteenth amendment and was void.

Chicago, etc., Ry. Co. v. Minnesota, 134 U. S. 418.

The above cited decision is specially apposite in the case at bar, because the state of California, by the same constitution (adopted in 1879) which embodies the guaranty of due process on which the defendants rely (and which, it may be noted, is identical in terms with that contained in the constitution of Minnesota, Art. I, Sec. 7), also expressly provided with respect to the railroad commission created by that instrument, that:

> "In all controversies, civil or criminal, the rates of fares and freights established by such commission shall be deemed conclusively just and reasonable."
>
> Cal. Const. 1879, Art. 12, Sec. 22 (printed in Cal. Stats. 1909, p. XLVII).

Recent amendments to the constitution of California have somewhat altered the organization and functions of this state railroad commission, and have eliminated from the constitution itself the specific provision above quoted. But these amendments declare that:

> "The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be *unlimited by any provision of this constitution.*"
>
> Cal. Const., Art. 12, Sec. 23 (Am. Oct. 10, 1911); Stat. Cal. 1911, p. 2165.

Pursuant to this *carte blanc* authority, the legislature has made the rate regulations and all other orders of the commission conclusive upon the courts, except that the proceedings of the commission, before becoming final, are permitted

to be directly reviewed by the Supreme Court, to a certain limited extent.

Act of Dec. 23, 1911, Secs. 67, 70; Cal. Stats., Spl. Sess. 1911, pp. 55, 56, 58.

Such review by the State Supreme Court, of course, is merely a part of the legislative proceedings of the commission for the establishment of the rate, or other order, under the decision of this court in

Prentis v. Atlantic, etc., Co., 211 U. S. 210.

These provisions of the constitution of California, as adopted in 1879, and of the above statute enacted under the explicit sanction of the amendments of that constitution in 1911, by which conclusive effect is attempted to be given to the rate regulations of the railroad commission, demonstrate that the guaranty of due process in that constitution cannot be given the same operation and effect as the guaranty of the fourteenth amendment, although the latter is expressed in the same terms. For the state of California, by a form of legislation which is necessarily binding upon its courts, has constituted as due and sufficient process that which this court has declared to be prohibited by, and void because of, the provisions of the fourteenth amendment to the federal constitution.

It may be argued against our present conten-

tion that the state constitutional legislation which we have cited above does not apply to, and would not govern state courts in dealing with, the action of a municipal council in prescribing utility rates; and that if, in our case, the state courts would give such construction and effect to the state constitution as to nullify the ordinance here in question, this would be the equivalent of the federal guaranty.

To that we would reply, in the first place, that it cannot be shown that the courts of California would give such construction and effect to the state constitution; that, on the contrary, the history of this class of litigation in the decisions of the Supreme Court of California shows that it is only in deference to the federal constitution and the decisions of this court thereunder that the relief which complainant here seeks is awarded by the courts of the state.

In San Diego Water Co. v. San Diego, referring to a previous decision (the first, we believe, in which the question of constitutional limitations upon the legislative power of rate regulation was considered by that court) and to a provision of the constitution authorizing municipalities to fix water rates, the Supreme Court of California said:

> "Although that case was decided without the light cast on the subject by later decisions of the Supreme Court of the United States, and contains some observations which per-

haps may require modification, we are satisfied with the correctness of the construction there given to this section of the constitution."

San Diego Water Co. v. San Diego, 118 Cal. 556 (p. 566).

Among the observations in the former case to which the court thus referred were doubtless the following:

"It may also be conceded, for the purposes of this case, that when the board of supervisors have fairly investigated and exercised their discretion in fixing the rates, the courts have no right to interfere, on the sole ground that in the judgment of the court the rates thus fixed and determined are not reasonable. That such is the case is attested by numerous authorities." (Citations.)

"To fix rates not reasonable or compensation not just is a plain violation of its duty. But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."

Spring Valley Water Works v. City and County of San Francisco, 82 Cal. 286 (pp. 305, 306).

A reading of the several concurring and dissenting opinions (five in all) delivered by the different members of the court in San Diego Water Co. v. San Diego, *supra,* will disclose that the court in that case did not make much advance beyond the position taken in Spring Valley Water Works v. San Francisco, *supra,* and that there was no agreement upon the principles which the later decisions of this court have established as being implied in the federal guaranty of due process in its application to legislative action of this character.

And if the more recent (we believe, the last reported) decision of the state court upon these questions is examined, it will be readily apparent that it is the decisions of this court interpreting the fourteenth amendment to the federal constitution that the state court regards as establishing the law which it applies in determining the validity of the legislatively adopted rate regulation.

Contra Costa Water Co. v. Oakland, 159 Cal. 323 (particularly pp. 334-5).

We therefore submit that in view of this course of judicial decision in the state of California, it cannot be said that the guaranty of due process in the state constitution is construed or enforced by the courts of that state as the fourteenth amendment is construed and enforced by this court with regard to legislative rate regulations;

that, on the contrary, the courts of that state, in cases involving attacks on such regulations, consider that they are governed by, and are giving effect to, the provisions of the federal constitution, not those of the state constitution. Indeed, we submit, they could not have taken a contrary view of the matter, and considered the state constitutional guaranty of due process as authorizing the courts of the state to nullify legislative rate regulations without denying the propriety of what that constitution has ordained with respect to the state railroad commission.

Again, we submit that what is thus true of the judicial history of the state of California, in the enforcement of its local constitutional guaranty of due process, is largely true of the other states in which similar constitutional provisions exist. So that this court could not, without disregarding the plain facts of such history, assume that such provisions are, or would be, construed as subjecting legislative authority in the prescribing of rates to judicial revision, if it had not been for the adoption of the fourteenth amendment to the federal constitution, and the decisions of this court thereunder.

There is thus destroyed, we submit, the whole foundation of defendants' position, that because the bill alleges that complainant will be deprived of its property without due process, contrary to the federal constitution, it also shows that such

deprivation will be contrary to the state constitution.

From the foregoing considerations it follows, we submit, that any person who alleges that he has been deprived of property without due process of law, by any officer or agency of the state of California, in violation of the fourteenth amendment to the federal constitution, necessarily has the right to have the truth of that allegation determined, and relief awarded accordingly, by the federal courts, unless those courts are to abdicate the jurisdiction which has been conferred upon them by the constitution and laws of the United States, as they have heretofore been construed by this court in such cases as Knoxville v. Knoxville W. Co., *supra* (212 U. S. 1.), *Ex parte* Young, *supra* (209 U. S. 123), and the many prior cases cited therein.

VIII.

The Penal Provisions of the Ordinance Here Complained of Deny to Complainant the Equal Protection of the Laws, Regardless of the Reasonableness of the Rates Thereby Prescribed.

The Allegations of the Bill Showing Such Denial of Equal Protection Present a Federal Question Which is Wholly Independent of the Question Whether the Enforcement of the Rate Prescribed by the Ordinance Would Take Complainant's Property Without Due Process of Law.

Such Federal Question Gave the District Court Jurisdiction, Even Though the Case Presents State Questions,

We have now reached the discussion of the last consideration which we shall urge in opposition to the objection to jurisdiction which defendants have here interposed; a consideration which, we shall submit, demonstrates the untenability of that objection independently of all the considerations which we have heretofore presented.

We have already quoted from the decision of this court in *Ex parte* Young, *supra*, its clear affirmation of federal jurisdiction, in such a case as this, because of the alleged confiscatory character of the rate prescribed: i. e., without regard to the penalties or other sanctions by which its enforcement may be secured. But this court fur-

ther held that another distinct ground of federal jurisdiction existed in that case, which it stated thus:

> "Another federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employees, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation."
>
> *Ex parte Young*, 209 U. S. 123 (p. 144).

The opinion then proceeded to discuss the merits of that contention: and we have quoted in another connection, a portion of the reasoning by which the contention was sustained. We ask attention now both to the former quotations (from 209 U. S., at pp. 145 to 148), and to the following additional excerpts from the opinion in that case, further exhibiting the grounds of the

decision, and summing up the conclusion of the court:

"Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event.

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuc-

> cessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."
>
> *Ex parte* Young, 209 U. S. 123 (148).

We have also formerly shown, we believe, that the reasoning of this court in the above cited case is entirely applicable to the case at bar: that the difference in the severity of punishment, imposed for a single offense, between the act there in question and the ordinance here involved is not so material in amount as to affect the principle to be applied. For the fines denounced against the complainant corporation itself, as principal, for the violations of this ordinance which would be necessarily committed in demanding a higher rate for even a single month—the rates prescribed are monthly rates—would nearly equal the total value of complainant's physical property, upwards of six million dollars: the fine for each offense being 200 dollars, and the number of complainant's patrons exceeding 30,000. Moreover, each officer and agent of the complainant participating in any of such violations would be subject to like fines, besides imprisonment of one hundred days for each offense. [Bill, pars. XIX, XX; Rec., fols. 23, 24; Ord. secs. 2, 7, fols. 48, 51.]

We submit, therefore, that the ordinance in the case at bar presents precisely the same characteristics which met the condemnation of this court

in the case of *Ex parte* Young, *supra*. Beyond question its penal provisions would have the same effect in cutting off access to judicial relief, that this court there pointed out, in the language we have just quoted.

Now, there is no provision in the constitution of the state of California prohibiting the denial of the equal protection of the laws. Nor, if we mistake not is there any other provision in that constitution which would be given the effect upon a penal rate regulation which was attributed by this court to the guaranty of equal protection under the fourteenth amendment, in *Ex parte* Young, *supra*. Nor have defendants, in their plea, alleged or suggested the existence of any such provision in the state constitution. The court will therefore at once perceive the special bearing which the principle decided in that case has upon the jurisdictional question here raised. The penal provisions of the ordinance here in question, considered by themselves, do not violate any requirement of the state constitution. They could not and would not be pronounced void by the courts of the state, however the question might be raised, except upon the authority of the federal constitution, as interpreted by this court.

It will be argued, perhaps, that the penal provisions of the ordinance would fall with the rate which they are intended to sanction, if that should be held void as unreasonable and confiscatory.

But this—passing all other answers to the proposition—is in no way equivalent to the effect upon these penal provisions which the equal protection guaranty of the fourteenth amendment must have, under the decision of this court in *Ex parte* Young, *supra*. For it was there held, as we have seen, that under that amendment such penal provisions are "unconstitutional on their face, *without regard to the question of the insufficiency of those rates.*"

The necessary effect of this principle of decision upon the case at bar is that the complainant is entitled to go into the federal court and have the enforcement of the penal provisions of the ordinance enjoined, pending a judicial determination of the adequacy of the rates prescribed by that ordinance.

There can be no question, under the decisions of this court, that the federal question thus raised under the equal protection guaranty of the fourteenth amendment sustains the jurisdiction of the court below, even assuming that the alleged inadequacy of the rates presented a state question of such character that, if it were the only question in the case, jurisdiction thereof would be exclusively in the state courts (an assumption which, of course, we do not concede and have earnestly endeavored to disprove).

"It is settled law, as established by well-considered decisions of this court, pro-

nounced upon full argument and after mature deliberation, notably in Cohens v. Virginia, 6 Wheat. 264; Osborn v. Bank of the United States, 9 *id.* 738; Mayor v. Cooper, 6 Wall. 247; Gold-Washing & Water Company v. Keyes, 96 U. S. 199; and Tennessee v. Davis, 100 U. S. 257:— * * *

"That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

Railroad Company v. Mississippi, 102 U. S. 135 (140, 141).

In the leading case of Osborn v. Bank, cited *supra*, Marshall, C. J., thus laid down the rule which has ever since been followed:

"A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those

other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say, it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will."

Osborn v. United States Bank, 9 Wheat. 738 (822, 823).

The principle was stated with brevity as well as emphasis in Mayor v. Cooper, cited *supra*, as follows:

"Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be

a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction."

The Mayor v. Cooper, 6 Wallace 247 (252).

Not to multiply citations to a point so well established, we shall only refer to some of the cases applying this principle which we have had occasion to cite in other portions of our argument:

Hamilton Gas Co. v. Hamilton, 146 U. S. 258;

Manigault v. Springs, 199 U. S. 473;

Michigan, etc., R. Co. v. Powers, 201 U. S. 245;

Siler v. Louisville & N. R. Co., 213 U. S. 175.

Consistently with the principle thus long settled in the decisions of this court, we submit that federal jurisdiction of the case at bar cannot be denied without disregarding the positive decision of this court in *Ex parte* Young, *supra*, that such a penal provision in a legislative rate regulation as that here involved is a denial of the equal protection of the laws, and affords an independent ground of federal jurisdiction.

(Before concluding on this point, we would call attention to a feature of the penal provisions of the ordinance in question, which we have inadvertently neglected to mention, namely, the pro-

hibition of discrimination, which would effectually prevent testing the validity of the rates by means of a single violation of the ordinance.)

(Further, under point V, we would urge that the claim of state authority by the defendants, conceded by complainant, coupled with complainant's charge that the acts of defendant (being authorized by the state) deprive it of property contrary to the fourteenth amendment, make out a case of federal question claimed in good faith under the familiar rule stated in

Siler v. Louisville & N. R. Co., 213 U. S. ~~199~~ 175 (p. 191),

and assumed in

Raymond v. Chicago Traction Co., 207 U. S. 20;

Hamilton Gas Co. v. Hamilton, 146 U. S. 258.)

Conclusion.

We shall not further trespass on the time and patience of the court by attempting to summarize the several independent grounds upon which complainant maintains the existence of federal jurisdiction over the cause alleged in its bill herein, as against the objection thereto raised by the plea of the defendants. Such a general view of our several contentions, and of their relations one to the other, is sufficiently afforded by the topical index of points prefixed to the body of our brief.

In conclusion, therefore, we submit that for all of the reasons hereinbefore advanced, the decree of the learned District Court erred in dismissing the bill, for want of jurisdiction, and that the decree should therefore be reversed.

Respectfully submitted,

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No. 610.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

Home Telephone and Telegraph Company,
Appellant,
vs.
The City of Los Angeles, et al.,
Appellees.

BRIEF OF APPELLEES.

FIRST.

STATEMENT OF CASE.

As appellant has stated, this is a bill filed in the Circuit Court to restrain the enforcement of a municipal ordinance regulating charges for telephone service in the city of Los Angeles, on the ground that the rates prescribed were confiscatory and, if enforced, would deprive complainant of its property without that due process of law

guaranteed by the fourteenth amendment. The ordinance continued in force for the ensuing year a schedule of rates not lower than one theretofore voluntarily established by complainant in its dealings with its patrons. But it was claimed that, based upon changed conditions, existing at the time of the passage of the ordinance in question, said ordinance was unjust and unreasonable. To the bill a plea was filed wherein it was made to appear that the constitution of the state of California contained a guaranty that no person should be deprived of property without due process of law. From this it was argued that if the defendant city had attempted to fix a confiscatory rate for telephone service, its action was unauthorized by the state, and was null, void and of no effect under the state law; that if the allegations of the bill were established, the ordinance must be declared void under the state law, and for that reason the suit was not one "which really and substantially involved a controversy as to the effect or construction of the constitution or laws of the United States, *upon the determination of which the result depended.*"

The plea having been confessed, the contentions of the defendant were upheld by the court and the bill dismissed for want of federal jurisdiction.

The correctness of the above ruling presents the question to be considered on this appeal.

SECOND.

BRIEF OF ARGUMENT.

I.

The Fourteenth Amendment is Directed Against Action by the States.

The fourteenth amendment is aimed at state action. It is not directed against persons, against cities or against bodies public or private other than states. It is much less comprehensive in scope than the guaranty of due process to be found in many state constitutions.

To maintain its claim to federal jurisdiction therefore appellant must show that the *state of California* has taken action which will operate to deprive it of its property without due process of law or that the *state of California* denies to it the equal protection of the law.

But we contend that

II.

The State of California has Taken no Action.

Has the state of California deprived appellant of its property without due process of law or denied to it the equal protection of the law? No action has been taken by the state government, or in the name of the state, or in behalf of the state, or by any officer of the state government. It is not claimed that the state has acted except

through the alleged instrumentality of an agent. Officers of the city of Los Angeles, a separate and subordinate subdivision of the state of California, have passed a certain ordinance, which the bill alleges, would operate to deprive complainant of its property without due process of law. The state of California, however, by a plain and unambiguous provision of its constitution, advises complainant, a citizen of the state of California, that its property may not be taken without due process of law, and tells complainant, in effect, that if the charge is true that the ordinance of the city of Los Angeles is confiscatory, then that ordinance is null, void and of no effect, and directly violates the mandate directed by the people of the state not only to every officer of the state, but to every agency, public or private, operating within the state. In the face of this declaration by the state—in the face of this limitation upon the authority of every agent of the state, plainly and publicly expressed and known to complainant, it nevertheless comes into the federal forum and charges *the state* with the alleged confiscatory act. This too, without any appeal to the principal and without any act of alleged ratification on the part of the principal.

When did it become the law that known limitations upon an agent's authority no longer operate to protect the principal? Is it a tenable legal proposition that an act beyond the known limits

of an agent's authority, not confirmed or ratified by the principal is nevertheless the act of the principal?

Is it true that the act of an agent, merely in the exercise of an agency, is the act of the principal, regardless of limitations upon the agent's authority?

As we read the brief on its behalf complainant grounds its entire case, in support of federal jurisdiction herein, upon an affirmative answer to the last question. In taking this position we contend that appellant has fallen into error. We submit that *limitations on* an agent's *authority* are still operative and that no action by the state of California is shown by this record. Let us first examine this matter on principle. We contend that:

(a) THE CITY OF LOS ANGELES IS AN AGENT OF THE STATE OF CALIFORNIA WITH LIMITED POWERS, WHICH DO NOT INCLUDE AUTHORITY TO PASS OR ENFORCE A CONFISCATORY RATE ORDINANCE.

The constitution of the state of California provides (art. 1, sec. 13):

> "No person shall be deprived of * * * property without due process of law."

This constitutional provision must be read in connection with any act conferring authority to fix rates, and constitutes a limitation on such authority.

If, therefore, the ordinance attacked in this action is confiscatory, it is not authorized by the state. On the contrary it is in direct violation of the organic act of the state.

(b) ACTION BY THE CITY OF LOS ANGELES IN THE EXERCISE OF A STATE AGENCY, BUT NOT WITHIN THE LIMITS OF ITS AUTHORITY FROM THE STATE, IS NOT STATE ACTION.

It is an elementary principle of the law of agency, hardly necessary to be stated, that an unauthorized act of an agent is not the act of the principal. In other words, the scope of the agent's authority measures the principal's responsibility.

But what elements enter into the question of authority and what determines the "scope of an agency"? Appellant calmly assumes throughout the argument on its behalf that an act, merely in the exercise of an agency, is the act of the principal, regardless of known limitations upon the extent to which such exercise of agency is authorized to be carried. It is calmly assumed that because the city of Los Angeles is given certain authority in the field of public utility rate fixing, any act it may assume to perform *in that field* is the act of the state of California.

Is appellant's assumption warranted by the law? We are told in the course of the opinion of this court in Mechanic's Bank of Alexandria v. Bank of Columbia, 18 U. S. (5 Wheat.) 326, (5 L. Ed. 100) that

"The liability of the principal depends upon the facts; 1. That the act was done in the exercise, and 2. Within the limits of the powers delegated."

This is the invariable rule as between principal and agent and as between principal and all persons having knowledge of the limitations upon the agent's authority.

In private business transactions the scope of the agent's authority is sometimes held to be broader than the authority actually conferred, *as to persons having no knowledge of limitations upon the agent's authority.* Upon principles of estoppel an "ostensible agency" is said to arise, the extent of which agency is measured by the powers with which the principal has apparently clothed the agent.

But the principles of ostensible agency have no application to a public agent. The powers of such agent are defined by law of which all persons are deemed to have knowledge, hence the authority actually conferred always determines the scope of such agency. On principle it would seem, therefore, that the city of Los Angeles is the agent of the state of California with authority to fix rates, subject to the limitation that it shall not fix a confiscatory rate; that the act of the city, done (1) *in the exercise*, and (2) *within the limits* of its authority would be the act of the state. But that if, as alleged, the city has passed

a confiscatory rate ordinance, it has performed an act in the *exercise* of its agency but *not within the limits* of its authority.

Appellant in effect admits that if the city of Los Angeles had not been authorized to fix rates its assumption of authority to pass a rate ordinance would not make such act the act of the state. No criticism is offered upon such cases as Louisville v. Telephone Company, 155 Fed. 725, (discussed by appellant, brief pp. 95-6), where federal jurisdiction was denied on the ground that the defendant city of Louisville had not been granted authority to fix rates, hence its act, in assuming to pass a rate ordinance, could not be charged to the state of Kentucky and was not state action. Then why should appellant ask the court to ignore the other equally important element entering into the question of the agent's authority—*limitations* upon the extent of delegated powers? Appellant would scarcely deny that, if its allegation is true that the rate ordinance passed by the council of the city of Los Angeles is confiscatory, it is void under the state law. Why is it void under the state law? Because it is in excess of the authority of the city.

The vice in the entire argument of appellant—the essential weakness in its case, lies either in the assumption that the state of California has delegated to the city of Los Angeles *unlimited authority* in the matter of rate fixing or that limita-

tions upon an agent's delegated authority are of no consequence in determining the responsibility of the principal.

The former alternative position could scarcely be maintained. If appellant comes forward with the assertion that the rate ordinance of the city of Los Angeles is confiscatory, it has but to turn to the constitution of the state of California to learn that it is just such ordinances that the city of Los Angeles is forbidden to enforce.

But appellant seems to plant itself upon the other alternative—seems to take the position that if an agent is given some general authority, limitations upon that authority do not operate to deprive the act of the agent, in excess of his authority, of its character as an act of the principal. We are told, at page 75 of appellant's brief, that "of course it is not every act done by a state officer which can thus be charged to the state. If he acts entirely outside the scope of his authority, so that his act derives no legal effect or consequence because of his official character, such acts are no more the acts of the state than if the officer held no official position or authority at all. Such, essentially, was the nature of the act in the Barney case. A mere assertion of authority by an officer, or even an attempt to exercise it, is not enough to establish it." We shall not quarrel with that statement. But perhaps we may not agree with counsels' interpretation of it nor with

the application they impliedly make of it. In the first place, we should probably disagree with counsel as to the meaning of the term "scope of the officer's authority." We have tried to show that the scope of the authority of a public officer or agent, with powers defined by law, is the authority actually conferred and that any act *in excess of the officer's authority is an act without "the scope of his authority"* and not binding upon the state.

The statement, "If he acts entirely outside the scope of his authority so that his act derives no legal effect or consequence because of his official character, such acts are no more the acts of the state than if the officer held no official position or authority at all," is not to be quarreled with unless, by the use of the word "entirely," appellant means to imply that there is a sort of twilight zone, within the confines of which, a public officer, acting without the scope of his known authority, may nevertheless bind his principal. We contend that there is no such supposed twilight zone—that if the officer's act is in excess of his authority—if it is "outside his authority" it is *"entirely* outside his authority," and his act is not the act of the principal. We repeat that it is settled law that the "scope of an agency" is the authority actually conferred, where knowledge of that authority is shown, and that in the case of a public

agent, with powers defined by law, the authority actually conferred is the scope of the authority.

Of course we would not be understood as contending that wide discretionary power may not be conferred upon an agent. Nor would we suggest that with *unlimited* discretionary power, the agent's act would be void, merely because his discretion was unwisely or improperly exercised. What we do contend is that *limits may be fixed* beyond which an exercise of discretionary power may not extend. When limits are fixed the scope of the agency is the field thus fixed and limited.

The above quoted statement from appellant's brief also indicates that it is counsels' contention that the act of a public officer, outside, but not *"entirely outside"* the scope of his authority, may derive "legal effect or consequence" because of the officer's official character and hence may be regarded as the act of the state notwithstanding the officer's want of authority. Upon just what legal principle this contention is based we are not advised. Nor are we informed in that section of appellant's brief at page 25 *et seq.*, where the same idea is advanced under the caption "Nature and Effect of Legislative Regulation of Public Utility Rates in its Bearing on the Jurisdictional Question Here Involved."

We are told in this section of appellant's brief of the difficulty and expense of nullifying in the courts an unconstitutional rate ordinance. But

we are not told what bearing this has on the jurisdictional question. It is not clear to us how the act of the city in passing an alleged confiscatory rate ordinance, which by reason of its confiscatory character, the state has forbidden the city to pass or enforce, becomes the act of the state, merely because the passage of such ordinance by the city places upon appellant the burden of fighting the ordinance in the courts.

Let us concede for the purposes of the argument that the placing upon appellant of the burden of contesting an unconstitutional rate ordinance, at great expense to itself, is unjust and unwarranted and operates to deprive appellant of its property without due process of law. The question still remains—"by whose act is the confiscation worked?" Does the *mere magnitude* of the burden—the *extent of the deprivation,* make the act that of the state? May the state reasonably be expected to make laws that are self executing,—that are so framed that its citizens may never be subjected to the necessity of resorting to the courts for protection?

If appellant shall be permitted to resort to federal jurisdiction will its burden be materially lessened? Is it more difficult to establish the unreasonableness of a utility rate in the state court than in the federal court? And how does appellant's situation in this regard differ from that of the complainant in Barney v. New York? Cer-

tainly not in *kind but merely in degree* of deprivation. How does it differ from that of complainant in City of Louisville v. Cumberland Tel. Co., 155 Fed. 725? We are told in the opinion of District Judge Evans (155 Fed. 726) that

> "the bill * * * in substance and effect, avers that the defendant has enacted a certain ordinance whereby it undertook to fix the maximum rates which complainant might charge its patrons in the city; that the city had no lawful power to fix other than reasonable rates; that the rates fixed by the ordinance were unreasonably low; that the enforcement of the ordinance would, for that reason, practically confiscate the plaintiff's property; and that thus it would be deprived thereof by the city without due process of law, and in violation of the fourteenth amendment to the constitution of the United States."

By reason of other averments in the bill the learned Circuit Court of Appeals decided that there was no federal jurisdiction and the complainant was dismissed hence, notwithstanding the fact that if its complaint was well founded in fact, it faced the same onerous burden described by appellant in its brief (pp. 25-42). In other words, the *mere extent of the burden* placed upon the complainant in that case—the mere "legal effect or consequence" attaching to the act of the city of Louisville, because of the official character of the act, did not operate to make it the act of the state of Kentucky.

We submit that according to elementary principles of the law of agency, the act of the city of Los Angeles, done *in the* exercise of its agency, but *not within the limits* of its authority, is not the act of the state of California; that consequences attaching to the unauthorized act of the city have no bearing on the matter.

Having considered on principle the effect of the city's want of authority on the question of federal jurisdiction, we may next inquire how stands the matter upon the authorities dealing specifically with this question of jurisdiction. This brings us to the consideration of our third point:

III.

An Unauthorised Act of a State Agent is Not, Under the Authorities, State Action, Within the Meaning of the Fourteenth Amendment to the Constitution of the United States.

We think that the decisions of this court and of the inferior federal courts fully warrant the above conclusion. While the courts have not always discussed or made clear the principle underlying their decisions they have quite consistently held that an *unauthorized act* of a state agent is not within the inhibition against state action, contained in the fourteenth amendment to the constitution. The fact that the courts most frequently have had to consider cases where an alleged state agent had performed an *ultra vires*

act—where the agent had assumed to do an act on behalf of the state which was not "an exercise" of any delegated authority, by no means warrants the conclusion that the other element—action *within the limits* of delegated authority—may be ignored.

In the course of the opinion in the case of Huntington v. City of New York, 118 Fed. 683, it is said:

> "The inhibition of the fourteenth amendment is against action by a state depriving an individual of his property. * * * A state acts by agents and the inhibition runs against all who are in fact such agents, *acting within the scope of an authority* conferred upon them by the state." (Italics ours.)

Continuing, the learned court says:

> "Now, in the case at bar, the first question to be considered is whether the state, through its legislature, has given or undertaken to give authority to the rapid transit commissioners to construct this eastern tunnel, which is the thing complained of. If the legislature had merely selected the streets and avenues, and left it to the commissioners to determine whereabouts therein the tunnel should be located, the action of the commissioners would be the action of the state. But it did no such thing. It carefully provided for notice and hearing and consents, for the various steps which make up what is understood to be 'due process of law,' all to be carried on to a conclusion which should determine upon a route and general plan sufficiently detailed to show the

'extent to which any avenue is to be encroached upon and the property abutting thereon affected.' Upon such route only, and under such plan only, is any authority to construct conferred by the state on the defendants or any of them. When they depart from such plan, whatever trespass they may commit upon private rights is one which the state has not only not authorized them to commit, but under any fair interpretation of the rapid transit act has forbidden them to commit."

Referring to the facts involved in the case at bar we find that the state of California has authorized the city of Los Angeles to fix rates to be charged by public utility corporations for service rendered to its citizens, but *subject to* this important *qualification* that *said city shall fix no confiscatory rate.* May it not be said in this case, as it was said in substance, in Huntington v. New York: When the city departs from its instructions, and fixes a confiscatory rate, whatever trespass upon private rights it may commit is one which the state has not only not authorized it to commit, but under any fair interpretation of the law, has forbidden it to commit.

No one would deny that if the ordinance is confiscatory, it is void under the state constitution. Why is it void? Simply because it is unauthorized and contrary to the supreme law of the state.

The decision in Huntington v. New York was affirmed by this court (193 U. S. 44) upon the

opinion in Barney v. New York, 193 U. S. 430, a case which involved the same facts.

In the course of its opinion in Barney v. New York, *supra*, affirming the decision of the Circuit Court, this court said:

> "Thus, the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the state of New York within the intent and meaning of the 14th amendment, and the Circuit Court was right in dismissing it for want of jurisdiction.
>
> "Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. Complainant's grievance was that the law of the state had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the state; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law. Missouri v. Dockery, 191 U. S. 165, ante, 133, 24 Sup. Ct. Rep. 53; Civil Rights cases, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667."
>
> (48 L. Ed. 740.)

In the case at bar we submit that "it is for the state courts to remedy the act" of the city of Los Angeles "done without authority of, and contrary to the state law."

City of Louisville v. Cumberland Tel. & Tel. Co., 84 C. C. A. 151, 155 Fed. 725, was a proceeding in equity to restrain the enforcement of a municipal ordinance regulating charges for telephone service in the city of Louisville, on the ground that the rates prescribed were unreasonable, unjust and confiscatory, and, if enforced, would deprive complainants of their property without that due process of law guaranteed by the fourteenth amendment. The learned court, after quoting certain allegations of the bill to the effect that the defendant city had not been given authority by the constitution and statutes of Kentucky to pass the ordinance in question, said:

> "If this be true, there was no state authority behind the action of the Louisville common council, and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only. A municipal ordinance may be the exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state; but, to be given the force and effect of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises." (155 Fed. 729.)

Note that the court observes, in that part of its opinion quoted above, that "to be given the force and effect of a law of the state, it (a city ordinance) must have been enacted in the exercise of some legislative power conferred," etc. If a city ordinance must have *"the force and effect of*

a law of the state" in order that it may be considered state action, surely an ordinance in direct violation of the state constitution is not state action, for it has no force or effect whatever.

The bill, in the last above entitled cause, having alleged that the state had not delegated authority to the city to legislate upon the subject of rates, the court very properly pointed out that, if such allegation were true, the ordinance attacked had not been passed "in the exercise" of a power conferred by the state, hence the ordinance was not chargeable to the principal—the state, and was not "state action." That was as far as the learned court was required to go in disposing of that case. But as we have already suggested, in order that an act of an alleged agent may be deemed the act of the principal, the agent must have acted "within the scope of his authority," as well as "in the exercise of his agency."

In the case at bar the city was given authority to legislate upon the matter of rates, subject to the limitation that it must not fix an unreasonable rate. If, with such limitations upon its authority, the council of the city did, as appears from this bill, arbitrarily ignore and override the recommendations of its statistical board, and did fix an unreasonable, confiscatory rate, how can it be said that the act of the city was within the limits of its authority and was the act of the state?

The learned Circuit Court of Appeals, in its opinion in the Cumberland case, *supra*, said:

> "There was no state authority behind the action of the Louisville common council,"

hence its action was not state action. May it be said that there is any *state authority* behind the action of the Los Angeles city council, if that action was in direct violation of the supreme law of the state? Does the state authorize an act which its constitution prohibits and makes void?

> "There can be no difference between an ordinance which has been enacted *ultra vires* and an ordinance which has been enacted in violation of a general statute of the state which prohibits the precise and specific act which is done by the ordinance. In neither case is the ordinance state action, for in both cases it is void under the state law."
>
> City and County of S. F. v. United R. R. of S. F. (C. C. A.) 190 Fed. 507.

And there can be no difference in principle between an ordinance enacted in violation of a general statute of the state and an ordinance enacted in violation of the supreme law of the state, the constitution. How may a state be said to deprive its citizen of his property without due process of law, when the alleged act of deprivation is confessedly made void by the supreme law of the state, and its courts are open to him to have the act so adjudged? It is said by Judge Cooley (Const. Limitations, 7th ed. pp. 259, 260):

"When a statute is adjudged to be unconstitutional it is as if it had never been. Rights cannot be built up under it. Contracts which depend upon it for their consideration are void. It constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is also true as to any part of an act which is found to be unconstitutional and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

The very allegations of fact that complainant must make in order to state a case for relief under the 14th amendment establish, if true, the conclusion that the ordinance was unauthorized by the state and that it is absolutely void under the state law. Is a citizen of a state justified in going, or may he be permitted to go to the courts of the United States complaining that *his state* is attempting to deprive him of his property without due process of law, when he confesses that, if the matters and things involved in his complaint are true, the law of his state makes the act of alleged deprivation null and void and of no effect? We think not.

In the comparatively recent case of Memphis v. Cumberland Telephone Company, 218 U. S. 624, this court had under consideration the question of federal jurisdiction to grant relief from

an alleged confiscatory rate ordinance passed by the city of Memphis. In the course of its opinion, declaring against the existence of federal jurisdiction, this court reviews and approves many of the above cited decisions. Speaking by Mr. Justice Day, this court says:

> "It appears from an examination of the bill that it is distinctly charged therein that the ordinance was passed without authority of the state, and its attempted passage it is alleged was an abuse of power by the city. There is no reference in the bill to any provision of the Federal Constitution. If any can be said to be violated, it must be the fourteenth amendment. It is hardly necessary to say that that amendment is aimed at state action, in the provision that no state shall deprive any person of life, liberty or property without due process of law. The bill, therefore, so far from charging a violation of the fourteenth amendment by an authorized action of the state, distinctly and in terms avers that the ordinance was passed without state authority. That such municipal legislation does not lay the foundation of federal jurisdiction has been repeatedly held in this court. Hamilton Gas Light Company v. Hamilton, 146 U. S. 258, in which many of the previous cases in this court are cited. In that case Mr. Justice Harlan, speaking for the court, said of an ordinance passed without legislative authority: 'A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States.'
>
> "In Barney v. City of New York, 193 U. S. 430, the bill invoked the jurisdiction of the Circuit Court of the United States upon

the ground that the plaintiff was deprived of his property without due process of law; other allegations of the bill showed that the matters complained of were not only not authorized, but were forbidden by the legislation of the state, hence the action did not invoke the protection of the fourteenth amendment because of action by the state of New York, and therefore it was held the bill was properly dismissed for want of jurisdiction. In that case some of the previous cases in this court, to the same effect, are reviewed by Mr. Chief Justice Fuller, who delivered the opinion of the court.

"A question closely analogous to the one at bar came before the Court of Appeals of the Sixth Circuit, Judge Lurton delivering the opinion of the court. City of Louisville v. Cumberland Telephone & Telegraph Co., 155 Fed. Rep. 725. In that case the jurisdiction of the Circuit Court was invoked on the ground that the ordinance of the city of Louisville regulating rates was in violation of a contract between the complainant and the city; also on the ground that the rates were unreasonable, unjust and confiscatory, depriving the complainant of property without due process of law, in violation of the fourteenth amendment of the constitution. In that case the bill was dismissed upon the ground that the allegations of the complaint showed that the case was not one arising under the constitution and laws of the United States. This was held to be so because of other statements of the bill, which it was held negatived state action, which alone could lay the foundation of jurisdiction, in that it averred that no power to regulate the rates charged by the complainant had been granted by the state of Kentucky to the mu-

nicipality which had undertaken to pass the regulating ordinance, and that the attempt to pass such ordinance was an unwarranted and unfounded assumption of power upon the part of the city.

"The claim that the jurisdiction should be sustained because the common council of the city of Louisville had assumed to act under authority of the legislature of the commonwealth of Kentucky, which was averred in the bill, was answered by the court saying that the existence of such regulating power was distinctly negatived by the allegation of the bill that the city had acted in the premises wholly without authority.

"So, in the present case, the statements of the bill are clear and distinct that the passage of the ordinance was without power, and a usurpation on the part of the city; and the allegations of the bill as to the confiscatory character of the ordinance can, consistently with the other averments of the bill, be referred only to the state constitution, which, as well as the federal constitution, inhibits attempts to take property without due process of law."

Appellant attempts to distinguish this and other cases upon which we rely, on the ground that *the allegations of the bill*, in these cases, showed a want of state authority for the act in question, while in the case at bar, the bill alleges that the act was done by authority of the state.

Appellant says (brief):

"It will not have escaped the notice of this court that in every one of the cases relied on in support of the defendant's objection, and which we

have above reviewed, the pleadings of the complainant itself alleged the lack of state authority for the acts complained of. Of precisely opposite character is complainant's bill in this case, which affirmatively alleges the delegation of authority by the state to the defendant city to prescribe rates to be charged by the complainant and other public utility corporations. This consideration alone, we submit, is sufficient to distinguish our case from those which were supposed to be adverse to our contention."

We do not see that the alleged point of distinction is at all material. If the cause came before the court on demurrer to the bill, its allegations alone would be considered. But this cause comes up on bill and plea. It is the office of a plea in equity to supply a missing or additional fact which should be considered in connection with the bill.

Farley v. Kittson, 120 U. S. 314, 30 L. ed. 688, 7 Sup. Ct. Rep. 534;
United States v. Peralta, 99 Fed. 624.

Of what possible importance is it whether the *bill* alleges absence of state authority or not, provided this appears from the bill, read in connection with a plea, whose truth is confessed?

As we view the matter, *this record shows* that the city of Los Angeles had power to fix utility rates, subject to the limitation that it should not fix a rate that would operate to deprive any person of property without due process of law.

Expressed differently, we think it sufficiently appears *from this record,* as it is stated to have been averred in the bill considered in Louisville v. Cumberland Tel. Co., 155 Fed. 725, that

> "Defendant has enacted a certain ordinance whereby it undertook to fix the maximum rates which complainant might charge its patrons in the city; that the city had no lawful power to fix other than reasonable rates; that the rates fixed by the ordinance were unreasonably low; that the enforcement of the ordinance would, for that reason, practically confiscate plaintiff's property and thus it would be deprived thereof by the city without due process of law, and in violation of the fourteenth amendment to the constitution of the United States."

When *the record shows* that the city of Los Angeles had no authority from the state to fix other than reasonable rates, but that it nevertheless proceeded to fix an unreasonable confiscatory rate, action in excess of state authority is shown. Our authorities do therefore apply.

In the course of his review of the authorities, the learned judge who heard this matter at circuit made the timely observation that no case had been cited where the Supreme Court of the United States had held that an ordinance of a city, manifestly in violation of an express provision of the state constitution, is action by the state. We know of no decision of this court to that effect and counsel have cited none. We do

not anticipate that there will be any such decision until this court is prepared to affirm that the unauthorized act of an agent is the act of the principal, and that a state deprives its citizen of his property by an act of a state agent which never had any validity under the state law.

IV.

The Result of this Suit Does Not Depend Upon the Effect or Construction of the Fourteenth Amendment, Hence the Suit is Not One Arising Under the Constitution or Laws of the United States.

Recent decisions indicate that the claim of federal jurisdiction herein should fail for the above stated reason.

In Memphis v. Cumberland Telephone & Telegraph Co., *supra*, an action involving telephone rates in the city of Memphis, it was alleged in the bill that the ordinance was passed without authority of the state and that its attempted passage was an abuse of power by the city, and this court said:

> "We said by the chief justice, in Western Union Telegraph Co. v. Ann Arbor Railroad Co., 178 U. S. 239; 'when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, *upon the determination of which the result depends*, it is not a suit arising under the constitution or laws.'"

Under the allegations of the bill and of the plea, the determination of the case at bar does not depend upon the construction of the fourteenth amendment to the constitution of the United States. The complainant has alleged that the ordinance is confiscatory. If that be so it was passed contrary to the mandate of the state, contrary to the law of the state and is not the action of the state.

If the fourteenth amendment had never been passed *the result of this suit should be exactly the same.* If the ordinance attacked is confiscatory it is void, regardless of the fourteenth amendment. *This suit does not* therefore *involve a controversy, the result of which depends,* in any degree, *upon the effect of the fourteenth amendment* or upon the effect of any other law of the United States.

Two decisions, much in point upon the matter here involved, have recently been rendered by the Circuit Court of Appeals for the Ninth Circuit. *Seattle Electric Company v. Seattle R. & S. Ry. Co.,* (C. C. A.) 185 Fed. 365, and City and County of San Francisco v. United R. R. Co. of San Francisco (C. C. A.) 190 Fed. 507, declare in substance, that no question involving the effect or construction of the fourteenth amendment arises where the state constitution contains a similar provision.

Seattle Electric Company v. Seattle R. & S. Ry. Co., *supra*, was an action brought by a street railway corporation owning a franchise over a street in the city of Seattle. Complainant's franchise not being exclusive, the city council granted a second franchise to another street railway corporation, authorizing the latter to occupy the same street with its tracks. In the granting of that franchise provision was made that no tracks should be laid until the amount of damage had been ascertained and arrangements for compensation made with the owner of the first franchise. The bill was filed upon the ground that notwithstanding these provisions of the ordinance, tracks were being laid and the complainant was being deprived of its property without due process of law and contrary to the provisions of the fourteenth amendment to the federal constitution. After discussing the provisions of the ordinance, the court, speaking by Judge Morrow, said:

> "But there is a further and, as we believe, a conclusive objection to the claim of right on the part of the complainant to invoke the jurisdiction of the Circuit Court on constitutional grounds. It seems to us that in no aspect of the grant to the defendant is there a real and substantial dispute or controversy dependent upon the application of provisions of the federal constitution. If it should be conceded that in some view of the ordinance and defendant's action, under color of its provisions, there would be a taking of complainant's property without due process of law,

still it would not follow that the Circuit Court had jurisdiction of the case unless the ordinance in that respect would be the supreme law of the state. The supreme law of the state is the constitution of the state; and that document provides in Article 1, Section 3, as does the fourteenth amendment to the constitution of the United States, that: 'No persons shall be deprived of life, liberty or property without due process of law.'

"Under this provision of the state constitution the ordinance would be as invalid as under the federal constitution. It would be with respect to the former as the complainant charges in its complaint with respect to the latter, 'without authority in law, null and void, and of no force and effect.' The presumption is that the courts in Washington will not deny to any of its citizens or corporations the equal protection of its constitution. If, however, it should turn out that we are mistaken in this respect the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States. 'The doctrine here is that the aggrieved party must first invoke the aid of the state courts, since it is for the state courts to remedy the acts of state officers done without authority of, or contrary to, state law. In such a case the complaining party must exhaust his remedy in the state courts by prosecuting his case in the state court of last resort for cases of that character; and until he has done this, it cannot be said that he has been denied due process or deprived of his property by state action. If the decision of the highest state court to which he can resort is adverse to him, he can then take his case on a writ of error to the United States Supreme Court upon the

ground, not that the proceeding or action complained of was contrary to or unauthorized by state law, but upon the ground that what was complained of as a deprivation of life, liberty or property without due process of law in violation of the fourteenth amendment has at last received the sanction of the state and, in effect, become the act of the state itself.'"

In the later case of City and County of San Francisco v. United R. R. Co. of S. F., *supra*, the doctrine of the Seattle case was expressly reaffirmed.

We repeat that this case does not present a controversy, the result of which depends in any degree, upon the fourteenth amendment to the constitution of the United States; that if said amendment had never been adopted the result of this suit should be exactly the same. For that reason, and on the above authorities, there is no federal jurisdiction of the cause.

Summarizing the argument from the standpoint of appellee, we submit that the solution of the problem, presented by this case, lies in an application of the principles of agency; that, on principle, the act of an agent, done in the exercise of his agency, but not within the limits of his authority, is not the act of his principle; that, on authority, the act of a state agent in violation of authority from the state, is not action by the state; that if, as alleged, the ordinance here attacked is

confiscatory, it is void under the state law, and for that reason the cause does not present a controversy, the result of which depends upon the effect or construction of a law of the United States.

Having presented the case from the standpoint of appellee we shall now consider some arguments advanced by appellant.

V.

Appellant's Arguments Considered.

(a) DEFENDANT NOT ESTOPPED TO QUESTION JURISDICTION.

(Refers to appellant's brief, pp. 102-106.)

Appellant is concerned lest defendant may be permitted to "stultify itself" by successfully setting up its own want of authority to pass a confiscatory rate ordinance. It is urged that the court should take jurisdiction of this case because it would be wrong to permit defendant successfully to plead its own want of authority.

This is a somewhat unique argument to advance in support of federal jurisdiction. We had supposed that jurisdiction over the subject matter could not be created by the parties, either by consent or by acts of estoppel; and that it would be the duty of the court of its own motion, to dismiss a cause over which it had no jurisdiction, regardless of the conduct or attitude of the parties.

Moreover, immaterial though it may be to the matter before the court, we cannot refrain from declaring that we do not for one moment admit, except for the purpose of testing the sufficiency of the bill herein, that the ordinance attacked is confiscatory or unauthorized.

Our plea is in the nature of a speaking demurrer and does not, either in law or morals, commit us to the position assumed for the purpose of the argument. We contend that *if* the ordinance is confiscatory, it is unauthorized and not state action.

(b) That a Suitor Has His Choice of Forum is Not Denied.

(Refers to appellant's argument—brief, pp. 106-113.)

If concurrent jurisdiction existed we should, of course, concede that the suitor might take his choice of forums. For instance, if the fourteenth amendment had provided that—

"No person shall be deprived of property without due process of law," we should readily agree that appellant might attack us in either the state or the federal court. State action need not then appear, and appellant would have choice of forum.

(c) THE CONSTITUTIONAL GUARANTY OF DUE PROCESS CONTAINED IN THE CONSTITUTION OF CALIFORNIA HAS NOT BEEN IMPAIRED BY JUDICIAL CONSTRUCTION.

(Refers to appellant's argument—brief, pp. 113-122.)

We submit that an examination of the decisions of the Supreme Court of California will demonstrate that the constitutional guaranty, that acts of confiscation shall not be permitted, is as broadly and liberally interpreted there as elsewhere. Even if such had not been the case in the past, this court should not indulge the presumption that the courts of California would fail to apply the plain mandate of the state constitution in appellant's case. On the contrary, as was well said in Seattle Electric Co. v. Seattle R. & S. Ry. Co., 185 Fed. 365:

> "The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its constitution. If, however, it should turn out that we are mistaken in this respect, the complainant will have his remedy in an appeal from the highest court of the state to the Supreme Court of the United States."

Moreover, it is the duty of this court to place its own interpretation on the California constitutional provision.

The decisions of the Supreme Court of California are not before this court, and if they were

it would not alter the case. This court has before it a bill alleging an act of confiscation by an alleged state agent and a plea, designed to show, as a fact, that such alleged act was not the act of the state, because unauthorized. The question of the sufficiency of that plea is for this court to determine, and it will place its own construction on the California constitutional provision.

Indeed we may go still further and say that if the state Supreme Court should hereafter so construe the state constitutional provision in this appellant's case that due process of law shall be denied, it would be an act of ratification by the state of the unauthorized act of the city of Los Angeles.

This would make the adopted act of the city the act of the state and would form the basis for a writ of error to the Supreme Court of the United States, when it would be the duty of this court to correct the error of the California court.

For the above reasons it would seem that what the Supreme Court of California may or may not have said is wholly immaterial to this case.

(d) THE CONCLUSION DOES NOT FOLLOW THAT THE ADOPTION OF DEFENDANT'S CONTENTION HEREIN WOULD MEAN THE DESTRUCTION OF FEDERAL JURISDICTION TO ENFORCE THE GUARANTIES OF THE FOURTEENTH AMENDMENT.

(Refers to appellant's argument, brief, pp. 17-24.)

In the discussion contained in that part of its brief at page 17 *et seq.*, appellant advances the somewhat startling proposition that defendant's contention in this case, if followed to its logical conclusion, would mean the destruction, not only of all original jurisdiction of the federal courts to enforce the guaranties of the fourteenth amendment, but would also take away the jurisdiction of this court to enforce the amendment by reviewing the decisions of state courts.

Appellant says, (brief, pp. 18-19), that if it is true that a city has no authority to do that which the state constitution forbids,

"* * * certainly it must be just as true that no officer or agent of the state can be given authority to do that which the constitution of the United States forbids; for that instrument itself declares that it is the supreme law of the land. * * * If it were true, then that within the meaning of the fourteenth amendment no act forbidden by a state constitution could be deemed to be the act of the state, so as to give federal courts jurisdiction to restrain or redress it, until the state courts have sanctioned such act, then the same must be equally true of any act forbidden by the federal constitu-

tion; and thus all original jurisdiction of the federal courts to enforce the guaranties of the fourteenth amendment would be destroyed in every state whose constitution contains a like guaranty.

"* * * furthermore, * * * if a case in which denial of due process is charged were brought to this court on appeal or writ of error to the court of such a state, and this court should therein determine that the charge were true, this would only establish, if defendant's contention here is correct, that the act complained of was done in violation of the constitution, and therefore without the authority of the state, and so was not prohibited by the federal constitution or remediable by this, or any federal court."

This argument would seem to indicate an entire lack of comprehension of the real basis of our contention. It never has been contended by defendant that an act could not be deemed to be the act of the state *simply because such act violated law.* Rather has it been our contention that an *act of* an alleged *agent could not be deemed* to be the *act of* his *principal, if* it was found to be *in excess of* his *authority;* that the constitution of the state was to be deemed to be in the nature of a general order to subordinate agencies of the state; that the alleged act of the city, in this case, could not be deemed to be the act of the state, because in excess of the city's authority, and null and void under state law.

But the city is not an agent of the federal government. It is a state agent, hence it does not follow that responsibility for an act could be de-

nied, solely because it violated the federal constitution. The city is a mere subordinate agency of the state, controlled by and responsible to the state. It is because the city's act is in excess of the city's authority from the state, not because it violates law, that it is not state action.

If the ordinance in question is confiscatory, it violates appellant's constitutional rights. But what constitutional rights? Not its rights under the federal constitution, because the act is not an act of the state. It is to the city's principal, the state, that the fourteenth amendment is directed. When, however, the act of the city is called in question before the Supreme Court of the state—the body provided by the state to pass on such matters for the state, and that body determines that an act of confiscation is not such, then may it be said that the state has ratified and confirmed the confiscatory act and made it the act of the state. The injured party may then come before this court, by writ of error, and rightfully complain that *his state* deprives him of his property without due process of law.

It is true that the principle for which we contend, that the state must ratify and confirm an act of a city government, which violates the state constitution, before federal jurisdiction under the fourteenth amendment shall attach, would oust the inferior federal courts of original jurisdiction *in all similar cases*. Whether this principle

should be extended so as to include those agencies which constitute the state government, which act for the state, and in the name of the state, and which, for some purposes, may be regarded as the state, is a question not now before the court. Logically, we should say that no act of any state agent, in excess of his authority and in violation of the state constitution, should be held to be the act of the state until that act had been ratified by the state, by the declaration of its Supreme Court, the body provided by the state to pass on the question of the constitutional authority of state agents.

This court, however, has indicated that where one "acts in the name of the state and for the state and is clothed with the state's powers, his act is that of the state." (Raymond v. Chicago Union T. Co., 207 U. S. 20; 52 L. Ed. 78.) Whether by the above statement the court is to be understood as meaning that one who, acting for and in the name of the state, is doing an act in violation of the state constitution, and which, presumptively, the state will enjoin and prevent if appealed to, may be said to be "clothed with the state's powers" is a matter we need not here consider. As indicated by the learned circuit judge, in his opinion herein, there is an important difference between the act of a state officer, acting for and in behalf of the state and in the name of the state, and the act of a subordinate agency,

such as a city government which does not act for, or in the name of the state, and does not represent the state, except in a limited sense.

As to these subordinate state agents, at least, we submit that it would violate a thoroughly established principle of agency to hold their unauthorized acts to be the acts of the state.

Even if it be agreed, however, that the logical result of our contention would be the destruction of all original jurisdiction of the inferior federal courts, in cases arising under the fourteenth amendment, we can not see how that consideration is material. The court is here *applying* the law and the constitution. It is not engaged in *making* either. It is applying a constitution which says that no state shall deprive any person of property, not one which says that no person shall be deprived of property. Nor is it applying a constitution which provides that no *city* shall deprive any person of property.

Let us not be led into an indefensible position in an effort to retain a jurisdiction which does not exist. If it is desirable that the inferior federal courts should have a jurisdiction that they do not lawfully possess, let the constitution be changed.

As for the inferior federal courts, congested with a mass of litigation of this character which it was never intended that they should handle, and which should be taken care of in the state courts, they will doubtless grieve but little over

its loss. As for the litigant, we have shown that he has his remedy as against an erroneous state judgment which operates to deprive him of his property without due process of law.

(e) THE PENAL PROVISIONS OF THE ORDINANCE DO NOT OPERATE TO DENY TO APPELLANT THE EQUAL PROTECTION OF THE LAW, NOR DOES THAT PHASE OF THE CASE PRESENT AN INDEPENDENT GROUND FOR FEDERAL JURISDICTION.

(Refers to appellant's argument—brief, pp. 123-132.)

In the closing pages of its brief, (pp. 123 *et seq.*), appellant sets forth, what it terms an "independent ground of federal jurisdiction." Attention is directed to the case of *Ex parte* Young, 209 U. S. 123, where it substantially was held that the allegation that the penalties provided in certain state legislation were so enormous as to prevent the corporation affected from applying to the courts for relief, amounted to a declaration that the corporation had been denied the equal protection of the law, and presented an independent ground of federal jurisdiction. It is then argued that the ordinance here in question provides a severe penalty; that the constitution of California contains no provision guaranteeing the equal protection of the law, and the conclusion is drawn that this presents an entirely independent ground of federal jurisdiction.

Is it an independent ground of federal jurisdiction? This leads us once more to inquire, "against whom is the fourteenth amendment directed?" Does the amendment guarantee that no person shall be denied the equal protection of the law, or does it declare that *no state* shall deny such equal protection? If the act of the city was unauthorized by the state because confiscatory, it is not the act of the state.

The denial of the equal protection of the law, then, is not the act of the state. Since the fourteenth amendment does not declare that *no city* shall deny to any person the equal protection of the law, no independent ground of federal jurisdiction is presented.

Independently of the above consideration, we submit that appellant's claim of denial of equal protection is untenable. A moment's consideration will show how inapplicable to this case is the doctrine of *Ex parte* Young, *supra,* on which appellant bases its argument. The court there had under consideration an application for a writ of habeas corpus to test the validity of a commitment for contempt. The petitioner had been committed for violating an injunctive order of the Circuit Court of the United States. The validity of the order of commitment depended upon the jurisdiction of the Circuit Court of the United States over a proceeding in equity, theretofore filed in that court by citizens of Minnesota. That

proceeding was instituted by *stockholders* of certain railroad corporations seeking an injunction against the authorities of the state of Minnesota to restrain the enforcement of certain rate legislation, on the ground that the rates were confiscatory.

Jurisdiction was claimed on the ground, among others, that the rate legislation prescribed penalties so drastic as to prevent the corporations in question from attempting to test it for fear of the consequences, in the event of an unfavorable result, thus denying to such corporations the equal protection of the law. As above indicated the bill was filed by *stockholders* who alleged that the corporations, their officers and directors positively refused to institute proceedings to test the law because of the ruinous consequences in the event of failure of the attack on the law.

This court said in its opinion, (207 U. S. 144):

> "Another federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employees, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question,

> at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation."

Does this record present any facts in any way analogous?

Compared with the drastic penalties described in *Ex parte* Young, the penal provision of the ordinance here in question looks harmless. It reads thus:

"Sec. 7. That any person, firm or corporation mentioned in this ordinance violating any of the provisions of this ordinance sh[illegible] be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than two hundred ($200) dollars, or by imprisonment in the city jail for a period of not more than one hundred (100) days, or by both such fine and imprisonment."

Appellant appears to have regarded it as being in fact as harmless as it looks.

The action here is not by stockholders. No refusal by this corporation to test the law. On the contrary, it rushes to the courts at the first opportunity and applies for an injunction. It would seem that the ordinance here in question was not so drawn as to prevent attack by the corporation.

In either aspect of the case at bar there is no *independent* ground for federal jurisdiction. In

our opinion, appellant must stand or fall according as it is held that the ordinance of the city of Los Angeles is, or is not, state action.

What are the cases relied upon to support the affirmative of the above proposition?

VI.

Appellant's Authorities do Not Support its Contention that Action by a City, in Violation of the State Constitution, is State Action.

We shall not attempt an extended review of the cases cited.

In our opinion, many of these cases have no application whatever to the problem under consideration in the case at bar. For instance, Yick Wo v. Hopkins, 118 U. S. 356, and City of Los Angeles v. Dobbins, 195 U. S. 223, are cited, and extracts from the respective opinions are quoted. In neither case was federal jurisdiction questioned. The only matter considered was whether the respective ordinances, as administered, constituted a proper exercise of the police power.

The necessity of a denial of due process by the *state*, in order to confer federal jurisdiction, was not even mentioned in either opinion.

Moreover both of these cases came before this court on writ of error to the highest state court, whose opinion and decision, adverse to the complainant, would amount to a ratification by the state of the action in question.

Strauder v. West Virginia, 100 U. S. 303, *Ex parte* Virginia, 103 U. S. 339, and Virginia v. Rives, 103 U. S. 313, are cited and considered. A careful examination of the several opinions in these cases, in the light of the facts involved, fails to reveal anything which may reasonably be said to be adverse to our contention in the case at bar. On the contrary a comparison of the opinions will serve but to fortify our position.

In Strauder v. West Virginia the discrimination alleged to infringe the constitutional rights of the complainant, was not a *violation of the law* of West Virginia. On the contrary, complaint was made because *the laws of the state* did not permit of service on juries of colored men. Moreover the matter was first carried to the Supreme Court of West Virginia, where the alleged discrimination was ratified by the judgment of that tribunal.

The cause then came to this court on writ of error. Under such circumstances it could hardly be contended that if there was, in fact, a discrimination or a denial of due process the act was not that of the state. This court found that the *laws of West Virginia* worked a discrimination, and the courts of that state having applied that discriminatory law, it was held that *the state* of West Virginia had violated the fourteenth amendment.

Exactly opposite was the conclusion reached in Virginia v. Rives. The record in that case presented a different situation from that revealed in Strauder v. West Virginia. Complaint was not made, as in the Strauder case, that the *constitution or laws of Virginia* denied to complainants any civil right, or stood in the way of their enforcing the equal protection of the laws. The grievance of the complainants was because of the unwarranted action of the executive officers of the state in violation of the state law. The alleged discriminatory action of these state officers, in violation of state law, had not been ratified by the state by judgment of its courts, and the complaining parties were remanded to the state court. We repeat that a comparison of the conclusions reached in these two cases and of the opinions of the court, both prepared by the same learned justice, will serve but to strengthen and fortify our position in the case at bar.

In the course of its opinion in Virginia v. Rives, the court said:

> "The petition did not assert, nor is it claimed now, that the constitution or laws of Virginia denied to them any civil right, or stood in the way of their enforcing the equal protection of the laws. The law made no discrimination against them because of their color, nor any discrimination at all. The complaint is, that there were no colored men in the jury that indicted them, nor in the

petit jury summoned to try them. The petition expressly admitted that by the laws of the state all male citizens twenty-one years of age and not over sixty who are entitled to vote and hold office under the constitution and laws thereof, are made liable to serve as jurors. And it affrms (what is undoubtedly true) that this law allows the right, as well as requires the duty, of the race to which the petitioners belong to serve as jurors. It does not exclude colored citizens.

"Now, conceding as we do, and as we endeavored to maintain in the case of Strauder v. West Va., just decided (*ante*, 664), that discrimination by law against the colored race, because of their color, in the selection of jurors, is a denial of the equal protection of the laws to a negro when he is put upon trial for an alleged criminal offense against a state, the laws of Virginia make no such discrimination. * * * When a statute of the state denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions. * * * But when a subordinate officer of the state, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the state' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors, fails to discharge that duty in the true spirit of the law;

> if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason, it can with no propriety be said the defendant's rights is denied by the state and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior court. We cannot think such cases are within the provisions of section 641. Denials of equal rights in the action of the judicial tribunals of the state are left to the revisory powers of this court."

We agree with the court that it is a "fair presumption" that the state, through its courts, will apply the constitution and laws of the state and will nullify the acts of subordinate officers in excess of their authority and in violation of state law; and that "Denials of equal rights in the judicial tribunals of the state are left to the revisory powers of this court."

Appellant has pointed out that in Virginia v. Rives the court was considering rights of accused persons under the removal act of congress and it grasps at the court's statement, obviously correct, that the amendment is broader than the removal act. But counsel do not call attention to the court's most significant declarations of the law. They place an unwarranted construction

upon that part of the opinion to which they do direct attention. Counsel say:

"In the last named case (Virginia v. Rives) it was held, as shown, that the act of officers charged with the selection of jurors, although denying a right secured by the fourteenth amendment, did not afford cause for the removal of the case into the federal courts under R. S. section 641. It was not held, however, that such acts were not within the prohibition of the fourteenth amendment; on the contrary, it was explicitly affirmed that 'the constitutional amendment is broader than the provisions of the statute'; and it was said that the act of the administrative officer there complained of, although 'a criminal misuse' of the state law, was 'the act of the state and was prohibited by the constitutional amendment.'"

We challenge the accuracy of that statement. Counsel do not point out that the court's statement was that the act of the officer in violation of the spirit of the law was but "in a sense," the act of the state. Nor do they point out that the court tells us that.

> "When a statute of the state denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions. * * * But when a subordinate officer of the state, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or can not enforce, 'in the judicial tribunals of the state' the rights

> which belong to him. In such a case it ought to be presumed the court will redress the wrong."

They do not lay stress on the court's statement that

> "If, as in this case, the subordinate officer whose duty it is to select jurors, fails to discharge that duty in the true spirit of the law, * * * it can with no propriety be said the defendant's right is denied by the state and cannot be enforced in the judicial tribunals."

Such a quotation would point too unerringly to the conclusion that—if in the case at bar, the city of Los Angeles, a subordinate agency of the state of California, has directly violated the spirit and the letter of the state constitution, "it can with no propriety be said that a right is denied by the state."

Neal v. Delaware, 103 U. S. 370, is another case cited and relied upon by appellant. This cause also came before this court on writ of error to the highest state court. The gist of the decision is well stated in paragraph 7 of the syllabus (26 L. Ed. 568), as follows:

> "The alleged exclusion from the grand jury that found, and from the petit jury that was summoned to try this indictment, of citizens of the African race because of their race, did not result from the constitution or laws of the state as expounded by its highest judicial tribunals; and consequently, the accused was not entitled to the removal of the

> prosecution into the Circuit Court. Such exclusion, however, if made by the jury commissioners without authority derived from the constitution and laws of the state, was a violation of the prisoner's rights under the constitution and laws of the United States which the trial court was bound to redress; and the remedy for any failure in that respect is ultimately in this court upon writ of error to the state court."

Appellant quotes from the opinion, (brief, p. 53.) Note particularly the court's language as quoted by appellant:

> "The action of those officers in the premises is to be deemed the act of the state; and *the refusal of the state court to redress the wrong by them committed was a denial of a right secured to the prisoner by the constitution and laws of the United States.*" (Italics ours.)

We have no quarrel with such decisions. On the contrary, the decision accords with our contention that, if the judicial tribunals of the state fail to correct the acts of state agents, unauthorized by state law, whereby rights guaranteed by the fourteenth amendment are denied, "the remedy is ultimately in this court upon writ of error to the state court."

Such failure to correct, on the part of the state court, is an adoption by the state of the unauthorized act, and is equivalent in law to a ratification.

Scott v. McNeal, 154 U. S. 34;
Chicago etc. Ry. Co. v. Chicago, 166 U. S. 226, are also cited.

As anticipated by appellant, we shall and do claim that these decisions are of little value on the question of *original federal jurisdiction* under the fourteenth amendment. Both cases came before this court on writ of error to the state Supreme Court, and, as we have frequently pointed out, the action of the state court amounted to a ratification by the state, of the unauthorized act of its agent.

Commenting on these decisions, however, appellant says, (brief, p. 62):

"The judicial department of a state cannot be regarded as in any sense the exclusive organ of state action. It is only one of several independent and co-ordinate departments."

But the judicial department is that agency of the state vested with the state's authority to pass upon the question of the authority of state agents.

When an appeal is made to an intangible corporate principal to disavow the unauthorized act of its agent, such appeal must be made to an agent. That agent of the state government is the judicial department, whose function it is to interpret the state's constitution and laws and to determine the authority of state agencies.

Its declaration that a state agent's act was within his lawful authority should be held to be a ratification of the act by the state.

The claim could not thereafter be maintained that the act was not that of the state because unauthorized.

Raymond v. Chicago Traction Co., 207 U. S. 20, the latest case cited by appellant, and the one most relied upon, has been mentioned in the course of our review of authorities favorable to our contention.

In this case action by a state board of equalization, in carrying out a mandate from the Supreme Court of Illinois, was held to be state action within the meaning of the fourteenth amendment. The authority principally relied upon by the court was Chicago, etc., Ry. Co. v. Chicago, *supra*, a case which, as we have shown, came before this court on writ of error to the Supreme Court of Illinois. The court does not discuss the claim that the action of the board was in violation of the state constitution and laws. That *great weight must have been attached to the circumstance that the action of the board was pursuant to mandate from the state court* is clearly indicated by the dissenting opinion of Mr. Justice Holmes. In that dissenting opinion it is said:

> "Notwithstanding my unfeigned deference to the judgment of my brethren, I cannot but think that the Circuit Court was wrong in taking jurisdiction of this case. We all agree, I suppose, that it is only in most exceptional cases that a state can be said to deprive a person of his property without due process of law merely because of the decision of a court, without more. The discussion in Chicago, B. & Q. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581,

> concerned a judgment assumed to be authorized by a statute of the state, and in that case the judgment of the state court was affirmed, so that no very extensive conclusions can be drawn from it. So far as I know this is the first instance in which a Circuit Court has been held authorized to take jurisdiction on the ground that the decision of a state tribunal was contrary to the 14th amendment."

Viewed in that light the action of the board was considered to have had the sanction and approval of the state, through the declaration of the state Supreme Court, the body whose duty it was to construe and apply the state constitution.

Having thus hastily examined appellant's authorities, we are unable to find in them anything contrary to the position taken by the court in City of Memphis v. Cumberland Tel. Co., *supra*, nor anything which would have warranted or justified the learned circuit judge in refusing to follow the decisions of the Circuit Court of Appeals in Seattle Electric Co. v. Seattle R. Co., *supra*, and San Francisco v. U. R. Co., *supra*, nor anything that would warrant or justify the reversal of the decree herein.

Especially would we emphasize the fact that not a single case is cited, where *action by a city* in violation of the state constitution or laws, has ever been held to be state action, where the question of original federal jurisdiction was raised.

The decree of the learned Circuit Court accords with sound legal principle. It follows the decisions of this court and of the Circuit Court of Appeals. It is not opposed to any decision of this court in which the facts are at all analogous.

In conclusion we ask the court to apply to this case the principle of agency involved in Memphis v. Cumberland Telephone Company, *supra*, City of Louisville v. Cumberland Telephone Co., *supra*, and cases of that type. If an act of a city may not be said to be state action unless authorized by the state, this record discloses no state action.

We submit that, assuming the truth of all of the allegations of the bill and of the plea, the confiscatory rate ordinance in question is (1) unauthorized and void under state law and is not "state action;" (2) that the ordinance being void under state law, the suit does not present a controversy the result of which depends upon the construction of the federal constitution or laws; that for the above reasons there is no federal jurisdiction, and the judgment at circuit should be affirmed.

Respectfully submitted,

JOHN W. SHENK,
City Attorney,
GEORGE E. CRYER,
Assistant City Attorney,
Solicitors for Appellees.

OPINION

HOME TELEPHONE AND TELEGRAPH COMPANY *v.* CITY OF LOS ANGELES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 610. Submitted October 28, 1912.—Decided February 24, 1913.

One, whose rights protected by a provision of the Federal Constitution which is identical with a provision of the state constitution are invaded by state officers claiming to act under a state statute, is not debarred from seeking relief in the Federal court under the Federal Constitution until after the state court has declared that the acts were authorized by the statute.

The provisions of the Fourteenth Amendment are generic in terms and are addressed not only to the States but to every person, whether natural or judicial, who is the repository of state power.

The reach of the Fourteenth Amendment is coextensive with any exercise by a State of power in whatever form exerted.

Under the Fourteenth Amendment the Federal judicial power can redress the wrong done by a state officer misusing the authority of the State with which he is clothed; under such circumstances inquiry whether the State has authorized the wrong is irrelevant. *Ex parte Young*, 209 U. S. 123, followed. *Barney* v. *New York*, 193 U. S. 430, distinguished.

Acts done under the authority of a municipal ordinance passed in virtue of power conferred by the State are embraced by the Fourteenth Amendment.

The power which exists to enforce the guarantees of the Fourteenth Amendment is typified by the immediate and efficient Federal right to enforce the contract clause of the Constitution as against those violating or attempting to violate its provision.

THE facts, which involve the jurisdiction of the District Court of a suit arising under the due process clause of the Fourteenth Amendment and the validity of an ordinance of Los Angeles, California, establishing telephone rates, are stated in the opinion.

Mr. James A. Gibson for appellant.

Mr. John W. Shenk and *Mr. George E. Cryer* for appellees:

The Fourteenth Amendment is directed against action by the States themselves and the State of California has taken no action.

The city of Los Angeles is an agent of the State of California with limited powers, which do not include authority to pass or enforce a confiscatory rate ordinance.

Action by the city of Los Angeles in the exercise of a state agency, but not within the limits of its authority from the State, is not state action. *Mechanics' Bank of Alexandria* v. *Bank of Columbia*, 5 Wheat. 326; *Louisville* v. *Telephone Co.*, 155 Fed. Rep. 725.

An unauthorized act of a state agent is not, under the authorities, state action, within the meaning of the Fourteenth Amendment to the Constitution of the United States. *Huntington* v. *New York*, 118 Fed. Rep. 683; aff'd 193 U. S. 440; *Civil Rights Cases*, 109 U. S. 3; *Barney* v. *New York*, 193 U. S. 430; *Missouri* v. *Dockery*, 191 U. S. 165; *Virginia* v. *Rives*, 100 U. S. 313; *Louisville* v. *Telephone Co.*, 155 Fed. Rep. 725; *San Francisco* v. *United Railroads*, 190 Fed. Rep. 507; *Memphis* v. *Telephone Co.*, 218 U. S. 624; *Hamilton Gas Co.* v. *Hamilton*, 146 U. S. 258; *United States* v. *Peralto*, 99 Fed. Rep. 624; *Farley* v. *Kitson*, 120 U. S. 314.

The result of this suit does not depend upon the effect or construction of the Fourteenth Amendment: hence the suit is not one arising under the Constitution or laws of the United States. *Memphis* v. *Telephone Co.*, 218 U. S. 624; *West. Un. Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 239; *San Francisco* v. *United Railroads*, 190 Fed. Rep. 507; *Seattle Elec. Co.* v. *Seattle &c. R. Co.*, 185 Fed. Rep. 365.

Appellant's arguments considered, defendant is not estopped to question jurisdiction.

That a suitor has his choice of forum is not denied.

The guaranty of due process contained in the constitution of California has not been impaired by judicial construction. *Seattle Elec. Co.* v. *Seattle &c. R. Co.*, 185 Fed. Rep. 365.

The conclusion does not follow that the adoption of defendant's contention herein would mean the destruction of Federal jurisdiction to enforce the guaranties of the Fourteenth Amendment. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20.

The penal provisions of the ordinance do not operate to deny to appellant the equal protection of the law, nor does that phase of the case present an independent ground for Federal jurisdiction. *Ex parte Young*, 209 U. S. 123.

Appellant's authorities do not support its contention that action by a city, in violation of the state constitution, is state action. *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Ex parte Virginia*, 100 U. S. 339; *Strauder* v. *West Virginia*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313; *Neal* v. *Delaware*, 103 U. S. 370; *Scott* v. *McNeal*, 154 U. S. 34; *Chicago &c. R. Co.* v. *Chicago*, 166 U. S. 226; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Memphis* v. *Telephone Co.*, 218 U. S. 624; *San Francisco* v. *Union Railroads*, 190 Fed. Rep. 507; *Seattle Elec. Co.* v. *Seattle &c. R. Co.*, 185 Fed. Rep. 365; *Louisville* v. *Telephone Co.*, 155 Fed. Rep. 725.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The appellant, a California corporation furnishing telephone service in the city of Los Angeles, sued the city and certain of its officials to prevent the putting into effect of a city ordinance establishing telephone rates for the year commencing July 1, 1911.

It was alleged that by the constitution and laws of the

State the city was given a right to fix telephone rates and had passed the assailed ordinance in the exercise of the general authority thus conferred. It was charged that the rates fixed were so unreasonably low that their enforcement would bring about the confiscation of the property of the corporation, and hence the ordinance was repugnant to the due process clause of the Fourteenth Amendment. The averments as to the confiscatory character of the rates were as ample as they could possibly have been made. The charge of confiscation was supported by statements as to the value of the property, and the sum which might reasonably be expected from the business upon the application of the rates assailed. The confiscatory character of the rates, it was moreover alleged, had been demonstrated by the putting into effect during the previous year of rates of the same amount as those assailed which it was charged the corporation at great sacrifice had after protest submitted to in order to afford a practical illustration of the confiscation which would result.

Being of the opinion that no jurisdiction was disclosed by the bill, the court refused to grant a restraining order or allow a preliminary injunction, and thereafter, on the filing of a formal plea to the jurisdiction, the bill was dismissed for want of power as a Federal court to consider it. This direct appeal was then taken.

The plea to the jurisdiction was as follows:

" . . . that this Court ought not to take jurisdiction of this suit for that the said suit does not really or substantially involve a dispute or controversy properly within the jurisdiction of this Court, for as much as the Constitution of the State of California, in Article 1, section 13 thereof, provides that 'No person shall be . . . deprived of life, liberty, or property without due process of law'; that this complainant, a citizen of the State of California, has never invoked the aid or protection of its said State to prevent the alleged taking of its prop-

erty, nor has complainant appealed to the courts of said State, nor to any of them, to enforce the law of said State."

The ground of challenge to the jurisdiction advanced by the plea may be thus stated: As the acts of the state officials (the city government) complained of were alleged to be wanting in due process of law and therefore repugnant to the Fourteenth Amendment—a ground which on the face of the bill, if well founded, also presumptively caused the action complained of to be repugnant to the due process clause of the state constitution—there being no diversity of citizenship, there was no Federal jurisdiction. In other words, the plea asserted that where, in a given case, taking the facts averred to be true, the acts of state officials violated the Constitution of the United States and likewise because of the coincidence of a state constitutional prohibition were presumptively repugnant to the state constitution, such acts could not be treated as acts of the State within the Fourteenth Amendment, and hence no power existed in a Federal court to consider the subject until by final action of an appropriate state court it was decided that such acts were authorized by the State and were therefore not repugnant to the state constitution. There is no room for doubt that it was upon this interpretation of the plea that the court held it had no power as a Federal court. The court said:

"It is true that the bill in the present case alleges, that, if the ordinance complained of 'is enforced, and your complainant thereby prevented from charging and receiving higher rates than the rates fixed by said ordinance, the State of California will thereby deprive your complainant of its property without due process of law,' etc. This charge, however, that the ordinance complained of is state action, is but a legal conclusion, while the facts alleged are, that the ordinance, if confiscatory, as shown by the bill, is directly prohibited by the Constitution of

the State, which, in article 1, section 13, expressly provides, among other things:

"No person shall . . . be deprived of life, liberty or property without due process of law.

"Thus, the case at bar comes within the rulings of the Circuit Court of Appeals in the Seattle and San Francisco cases, and is precisely covered by the conclusions of the court in the latter case as follows:

"'What we hold is that the averments of the bill itself exclude the case from the cognizance of the Federal Court as a case arising under the Constitution of the United States by alleging that the very ordinances which the appellees relied upon as constituting a violation of its contracts have been enacted in violation of the positive law of the state.'"

It is true that in passages of the opinion subsequent to those just quoted there are forms of expression which when separated from their context might tend to justify the inference that the court thought city ordinances of the character of the one assailed could not in any event be treated as state action. But when the passages referred to are considered in connection with the context of the opinion, it is certain that those expressions were but a reiteration in a changed form of statement of the previous ground, that is to say that state action could not be predicated upon the ordinance because if it was treated as repugnant to the due process clause of the Constitution of the United States it would also have to be considered as in conflict with the state constitution. Under this hypothesis the decision was that it could not be assumed that the State had authorized its officers to do acts in violation of the state constitution until the court of last resort of the State had determined that such acts were authorized.

Coming to consider the real significance of this doctrine, we think it is so clearly in conflict with the decisions of this

court as to leave no doubt that plain error was committed in announcing and applying it. In view, however, of the fact that the proposition was sanctioned by the court below and was by it deemed to be supported by the persuasive authority of two opinions of the Circuit Court of Appeals for the Ninth Circuit, before coming to consider the decided cases we analyze some of the conceptions upon which the proposition must rest in order to show its inherent unsoundness, to make its destructive character manifest, and to indicate its departure from the substantially unanimous view which has prevailed from the beginning.

In the first place the proposition addresses itself not to the mere distribution of the judicial power granted by the Constitution, but substantially denies the existence of power under the Constitution over the subject with which the proposition is concerned. It follows that the limitation which it imposes would be beyond possible correction by legislation. Its restriction would, moreover, attach to the exercise of Federal judicial power under all circumstances, whether the issue concerned original jurisdiction or arose in the course of a controversy to which otherwise jurisdiction would extend. Thus, being applicable equally to all Federal courts under all circumstances in every stage of a proceeding, the enforcement of the doctrine would hence render impossible the performance of the duty with which the Federal courts are charged under the Constitution. Such paralysis would inevitably ensue, since the consequence would be that, at least in every case where there was a coincidence between a national safeguard or prohibition and a state one, the power of the Federal court to afford protection to a claim of right under the Constitution of the United States, as against the action of a State or its officers, would depend on the ultimate determination of the state courts and would therefore require a stay of all action to await such determination. While

this would be obviously true as to cases where there was a coincident constitutional guarantee, in reason it is clear that the principle if sound could not be confined to a case of coincident Federal and state guarantee or prohibition, since, as the Constitution of the United States is the paramount law, as much applicable to States, or their officers, as to others, it would come to pass that in every case where action of a state officer was complained of as violating the Constitution of the United States, the Federal courts in any form of procedure, or in any stage of the controversy, would have to await the determination of a state court as to the operation of the Constitution of the United States. It is manifest that in necessary operation the doctrine which was sustained would in substance cause the state courts to become the primary source for applying and enforcing the Constitution of the United States in all cases covered by the Fourteenth Amendment.

It would certainly be open to controversy if the proposition were carried to its logical result whether the only right under the Fourteenth Amendment, which the proposition admits, to exert Federal judicial power growing out of wrongful acts of state officers would not be unavailing. This naturally suggests itself since if there be no right to exert such power until by the final action of a state court of last resort the act of a state officer has been declared rightful and to be the lawful act of the State as a governmental entity, the inquiry naturally comes whether under such circumstances a suit against the officer would not be a suit against the State within the purview of the Eleventh Amendment. The possibility of such a result moreover at once engenders a further inquiry, that is, whether the effect of the proposition would not be to cause the Fourteenth Amendment to narrow Federal judicial power instead of enlarging it and making it more efficacious. It must be borne in mind also that the limitations which the proposition if adopted would impose upon

Federal judicial power would not be in reason solely applicable to an exertion of such power as to the persons and subjects covered by the Fourteenth Amendment, but would equally govern controversies concerning the contract and possibly other clauses of the Constitution.

The vice which not only underlies but permeates the proposition is not far to seek. It consists first in causing by an artificial construction the provisions of the Fourteenth Amendment not to reach those to whom they are addressed when reasonably construed; and second in wholly misconceiving the scope and operation of the Fourteenth Amendment, thereby removing from the control of that Amendment the great body of rights which it was intended it should safeguard and in taking out of reach of its prohibitions the wrongs which it was the purpose of the Amendment to condemn.

Before demonstrating the accuracy of the statement just made as to the essential result of the proposition relied upon by a reference to decided cases, in order that the appreciation of the cases may be made more salient we contrast the meaning as above stated which the Fourteenth Amendment would have if the proposition was maintained with the undoubted significance of that Amendment as established by many decisions of this court.

1. By the proposition the prohibitions and guarantees of the Amendment are addressed to and control the States only in their complete governmental capacity, and as a result give no authority to exert Federal judicial power until by the decision of a court of last resort of a State, acts complained of under the Fourteenth Amendment have been held valid and therefore state acts in the fullest sense. To the contrary the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power. By this construction the

reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted.

2. As previously stated, the proposition relied upon presupposes that the terms of the Fourteenth Amendment reach only acts done by State officers which are within the scope of the power conferred by the State. The proposition hence applies to the prohibitions of the Amendment the law of principal and agent governing contracts between individuals and consequently assumes that no act done by an officer of a State is within the reach of the Amendment unless such act can be held to be the act of the State by the application of such law of agency. In other words, the proposition is that the Amendment deals only with the acts of state officers within the strict scope of the public powers possessed by them and does not include an abuse of power by an officer as the result of a wrong done in excess of the power delegated. Here again the settled construction of the Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorised the wrong is irrelevant and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.

To speak broadly, the difference between the proposi-

tion insisted upon and the true meaning of the Amendment is this, that the one assumes that the Amendment virtually contemplates alone wrongs authorised by a State and gives only power accordingly, while in truth the Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment. In other words, the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency. Thus the completeness of the Amendment in this regard is but the complement of its comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed. Under these circumstances it may not be doubted that where a state officer under an assertion of power from the State is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the Fourteenth Amendment cannot be avoided by insisting that there is a want of power. That is to say, a state officer cannot on the one hand as a means of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding the application of the Amendment, deny the power and thus accomplish the wrong. To repeat, for the purpose of enforcing the rights guaranteed by the Amendment when it is alleged that a state officer in virtue of state power is doing an act which if permitted to be done *prima facie* would violate the Amendment, the subject must be

tested by assuming that the officer possessed power if the act be one which there would not be opportunity to perform but for the possession of some state authority.

Let us consider the decided cases in order to demonstrate how plainly they refute the contention here made by the court below and how clearly they establish the converse doctrine which we have formulated in the two propositions previously stated. As to both the propositions, the cases are so numerous that we do not propose to review them all, but simply to select a few of the leading cases as types, concluding with a brief consideration of a few cases which are supposed to give support to a contrary view.

In *Virginia* v. *Rives*, 100 U. S. 313, the case briefly was this: An accused person sought to remove from a state to a Federal court the trial of an indictment pending against him on the ground that he was a colored person and although by the state statute he had a right to have people of his race serve on juries, that in practice on account of race prejudice they were excluded and thereby he was denied the equal protection of the laws. Two questions arose for decision—first, was the alleged exclusion a violation of the Fourteenth Amendment, and second, if it was did it afford ground for a removal of the case? Considering the first, the court said (p. 318):

"The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals. . . ."

Determining whether the enforcement by the state officer of a non-discriminating statute in a discriminatory manner was within the Amendment, it was said (p. 318):

"It is doubtless true that a State may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal pro-

tection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court in which it is denied into a Federal court where it will be acknowledged."

Thus holding that the enforcement by a state official of a statute in a discriminatory manner although the statute might not be inherently discriminating was within the Amendment, the question of the right to remove was considered and it was decided that the removal act of Congress was narrower than the Constitutional Amendment and did not confer the right to remove.

In *Ex parte Virginia*, 100 U. S. 339, the case was this: A judge of a Virginia county court was indicted under the Civil Rights Act for excluding negroes from juries on account of their race, color, etc. The accused applied to this court for a writ of *habeas corpus* and a writ of *certiorari* to bring up the record and a like petition was presented on behalf of the State of Virginia, and both applications were disposed of at the same time. The first issue to be determined was the meaning of the Fourteenth Amendment. The ruling in *Virginia* v. *Rives* was reiterated, the court saying (p. 346):

"They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue

of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

Answering the claim that there was no power to punish a state judge for judicial action and therefore that the charge made was not within the Fourteenth Amendment, it was said that the duty concerning the summoning of jurors upon which the charge of discrimination was predicated was not a judicial but merely a ministerial one. It was, however, pointed out that even if this was not the case, as the state statute gave no power to make the discrimination, it was therefore such an abuse of state power as to cause the act complained of to be not within the state judicial authority, but a mere abuse thereof, and that it was "idle" under such circumstances to say that the offense was not within the Amendment (p. 348).

In *Neal* v. *Delaware*, 103 U. S. 370, a discriminating enforcement in practice of laws which were in their terms undiscriminating was again held to be within the Amendment, the language which we have quoted from *Ex parte Virginia* being reiterated.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, the enforcement of certain city ordinances was prohibited on the ground that they were within the reach of the Fourteenth Amendment. The court, reiterating the doctrine of *Virginia* v. *Rives* and *Ex parte Virginia*, held that this conclusion was sustained from a two-fold point of view—first, the terms of the ordinances, and second, in any event from the discriminatory manner in which the ordinances were applied by the officers.

In *Raymond* v. *Traction Company*, 207 U. S. p. 20, the whole subject—almost in the identical aspect which is here involved—came under consideration. The case concerned the repugnancy to the Fourteenth Amendment of a reassessment made by a state board of equalization, and the suit was originally commenced in a Federal court. It was pressed that as the claim of the complainant was in effect that the board in the reassessment had violated an express requirement of the state constitution in that the board had "disobeyed the authentic command of the State by failing to make its valuations in such a way that every person shall pay a tax in proportion to the value of his property," the act of the subordinate board could not be deemed the act of the State. This contention was held to be unsound and it was decided that even although the act of the board was wrongful from the point of view of the state constitution or law, it was nevertheless an act of a state officer within the intendment of the Fourteenth Amendment. It was pointed out that as the result of the enforcement of the reassessment would be an assertion of state power accomplishing a wrong which the Fourteenth Amendment forbade, the claim of right to prevent such act under the Fourteenth Amendment "constitutes a Federal question beyond all controversy." It was then said (pp. 35–36):

"The state board of equalization is one of the instrumentalities provided by the State for the purpose of raising the public revenue by way of taxation. . . . Acting under the constitution and laws of the State, the board therefore represents the State, and its action is the action of the State. The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that, whoever by virtue of public position under a

state government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State."

Referring to some reliance to the contrary placed upon a decided case, it was said (p. 37):

"*Barney* v. *City of New York*, 193 U. S. 430, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the State. Such is not the case here."

The reassessment complained of was held to be repugnant to the Fourteenth Amendment.

Finally the subject was elaborately considered in *Ex parte Young*, 209 U. S. 123. Without attempting to fully state the case it suffices to say that although the proceeding was one in *habeas corpus*, the controversy in its ultimate aspect concerned the power of a Federal court to prevent the enforcement of railroad rates fixed under state legislative authority which were confiscatory. In the course of an opinion reviewing the whole field it was said (p. 155):

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

Although every contention pressed and authority now relied upon in favor of affirmance is disposed of by the general principles which we have previously stated, before concluding we specially advert to some of the contentions

urged to the contrary. 1. Much reliance is placed upon the decisions in *Barney* v. *New York*, 193 U. S. 430, and *Memphis* v. *Telephone Co.*, 218 U. S. 624. The latter we at once put out of view with the statement that on its face the question involved was one of pleading and in no sense of substantive Federal power. As to the other—the *Barney Case*—it might suffice to say, as we have already pointed out, it was considered in the *Raymond Case* and if it conflicted with the doctrine in that case and the doctrine of the subsequent and leading case of *Ex parte Young*, it is now so distinguished or qualified as not to be here authoritative or even persuasive. But on the face of the *Barney Case* it is to be observed that however much room there may be for the contention that the facts in that case justified a different conclusion, as the doctrine which we have stated in this case was plainly recognized in the *Barney Case* and the decision there rendered proceeded upon the hypothesis that the facts presented took the case out of the established rule, there is no ground for saying that that case is authority for overruling the settled doctrine which, abstractly at least, it recognized. If there were room for such conclusion in view of what we have said it would be our plain duty to qualify and restrict the *Barney Case* in so far as it might be found to conflict with the rule here applied. 2. In the opinion of the court below, there is a suggestion that even though the Fourteenth Amendment embraces acts of state officers to the extent and scope which we have stated, nevertheless the case here presented is not controlled by the Amendment since the case concerns not acts of officers done under state authority, but merely acts of city officials done under the authority of a municipal ordinance. But, as we have already pointed out, it was long since settled that acts done under the authority of a municipal ordinance passed in virtue of power conferred by a State are embraced by the Fourteenth Amendment.

Apart, however, from the controlling effect of the decisions rendered in cases concerning the enforcement of the Fourteenth Amendment, the unsoundness of the contention is plainly demonstrated by applying the established principle that the exercise of municipal legislative authority under the sanction of a state law is the exertion of state legislative power within the purview of the contract clause of the Constitution (Article I, § 10), declaring: "No State . . . shall pass any . . . law impairing the obligation of contracts." That this interpretation is here conclusive must be apparent, since it cannot be said that an act which is the exertion of state legislative power for the purpose of one provision of the Constitution is not the exertion of state legislative power under the operation of another constitutional provision, both being addressed to the same subject, that is, state legislative power.

And this gives rise at once to a demonstration from another and more final point of view of the incongruity which would result from maintaining the contention insisted upon. While the guarantees of the Fourteenth Amendment cover subjects not included in the contract clause, since the former embraces every manifestation of state power and the latter is concerned only with legislative power when exerted so as to impair contracts, yet the fundamental assertion of Federal power made by each Amendment is the same when the different subjects to which each is applicable are put out of view. To illustrate: The command of the Fourteenth Amendment "No State shall make any law abridging . . . nor shall any State deprive any person," etc., is in substance a manifestation of the same power exerted in the contract clause, saying "No State shall pass," etc. This being true, as it must be, the fact that from the foundation of the Government the contract clause has been enforced without any intimation that the power manifested by the

clause was restricted by limitations such as those which it is here insisted limit the power to enforce the guarantees of the Fourteenth Amendment, affords the most conclusive demonstration of the unsoundness of the contentions here made. The immediate and efficient Federal right to enforce the contract clause of the Constitution as against those who violate or attempt to violate its prohibition, which has always been exerted without question, is but typical of the power which exists to enforce the guarantees of the Fourteenth Amendment. See authorities as to the contract clause referred to in the opinion in *Ross* v. *Oregon*, *ante*, p. 150.

Reversed.